Book. British

THE

Duke of Norfolk's CASE:

OR THE

DOCTRINE OF PERPETUITIES

Fully set forth and Explain'd.

Printed *Anno Dom* 1688.

TO THE

READER.

Courteous Reader,

THis Case, in all its parts, hath been Collected with all the Care imaginable, by several good Hands; and what grand agitation it received, is not unknown to any that know Westminster-Hall: It may be recommended to the World for Publick use, upon that score alone: For what can be more reasonably thought to please, and take with Men of Judgment in any Profession, than to peruse the Skill and Arts, that have been curiously, and with as great integrity, made use of by men of the most Famous Reputation in what they profess? Besides too, if thou dost but consider the great Deliberations, and the mighty Cautions that have been always used by all Persons concern'd in the Conduct, Debate, and Judgment of this Cause, till after many Debates and Hearings at the Bar, it came to receive its final Judgment in the highest Court of the Kingdom, before the Lords in Parliament, assisted by all the Judges of England, Thou wilt certainly conclude, That no unkind acceptance ought to demur upon this Case. Here is variety of Learning manifest in the sundry Conceptions of Great and Learned Men; but the Nicety lies chiefly upon the Doctrine and Explication of that abstruse Notion in Law, called Perpetuities, concerning which, the Sage Opinions (introductive to this Case) of the great Council will better instruct thee (that were prudently taken by both Parties before the Cause commenc'd) and undoubtedly serve and answer the True Ends of a Preface infinitely beyond what thou canst expect from me. Their Opinions in

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Private are always delivered with as much Candour and Caution as their Arguments at the Bar. And the one may be truly ſaid to be of as great uſe to the Publick (when their Opinions can be had), if the Cauſe be Meritorious, and will bear it, as the other. Reader, it will be wholly impertinent to hold thee here; and I ſhould run my ſelf upon an abſolute neceſſity (if I ſhould detain thee longer from the fruition of thoſe delicacies I preſent thee) of troubling thee with my impertinent Complements, for preſenting thee with a needleſs and impertinent Epiſtle; Wherefore enter in, ſee it thy ſelf, and peruſe it for thy profit and ſatisfaction.

Farewell.

THE

THE

Duke of Norfolk's CASE.

A. Bargains and Sells to *L.* the Barronies of *Gr.* and *Br.* for 10 Months. 20 *Martii* 1647.

A. Grants the Reverſion of thoſe Baronies to *R.* and *D.* and their Heirs to the uſe of *A.* for life. Remainder to *E.* the Wife of *A.* for life, Remainder to *R.* and *D.* *&c.* for 200 years upon truſts, to be declared by another Deed of the ſame date, Remainder to *H. H.* his ſecond Son and the Heirs Males of his body, Remainder to *C. H.* his third Son, and the Heirs Males of his body, Remainder to *E. H.* his fifth Son, and the Heirs Males of his body, Remainder to *A. H.* his ſixth Son, and the Heirs Males of his body, Remainder to *B. H.* and the Heirs Males of his body, Remainder to the right Heirs of *A.* 21 *Martii* 1647.

L. Attornes Tenant to *R.* and *D.* *&c.*

A. makes another Deed, declaring the Truſt of the Term for 200 years reciting it, and the uſes in the laſt-mentioned Settlement ſays in the reciting part, That 'tis intended that the Term ſhould attend the Inheritance, the Profits be received by *H. H.* and the Heirs Males of his body; and for default of ſuch Iſſue, ſuch other perſons, who according to the limitation of Uſes, ſhould have had them if no ſuch term had been, ſo long as *T. H.* Eldeſt ſon of *A.* or any Iſſue Male of his body ſhall live. But in caſe *T. H.* die without Iſſue of his body, in the life of *H. H.* not leaving his Wife enſient with a Son, or that after the death of *E. H.* by failure of Iſſue Male of *T. H.* the honour of *A.* ſhould deſcend on *H. H.* then *H. H.* and his Heirs to be excluded of the Truſt, then the Indenture witneſſeth, that the Term ſhall be upon the Truſts and under the reſtrained Limitations and Proviſo's after-mentioned, *viz.* 21 *Martii* 1647.

If *T.H.* or any Iſſue Male of his body be living in truſt for *H.H.* and the Heirs Males of his body, until by the death of *T. H.* without Iſſue Male, and not leaving his Wife enſient with a Son, or after his death, by failure of Iſſue Male, the honour of *A.* deſcends to *H. H.* and in caſe the Honour ſhall not deſcend to *H. H.* that after the death of *H. H.* the Truſt ſhall be for the Heirs Males of *H. H.* and for default of ſuch Iſſue in truſt, to permit ſuch other perſons and their Iſſue Male reſpectively, to whom the Free-hold or Inheritance is limited by the former Deeds, to take the profits, as if no ſuch Leaſe were. And in caſe the Honour of *A.* deſcend upon *H. H.* then the Truſt for *H. H.* and his Iſſue Male to ceaſe.

And then as to the Barony of *Gr.* in truſt for *T. H.* and the Heirs Males of his body, Remainder to *T. H.* and the Heirs Males of his body, Remainder to *F. H.* and the Heirs Males of his body, Remainder to *B. H.* and the Heirs Males of his body, Remainder to *H. H.* and the Heirs Males of his body, Remainder to the right Heirs of *A.* the Father.

And as to the Barony of *Br.* as to one third part of it in truſt for *E. H.* and the Heirs Males of his body, Remainder to *F. H.* and the Heirs Males of his body, Remainder to *B. H.* and the Heirs Males of his body, Remainder to *T. H.* and the Heirs Males of his body, Remainder to *H. H.* and the Heirs Males of his body, Remainder to the right Heirs of *A.* And as to another third part of the Barony in truſt for *F. H.* and the Heirs Males of his body, with like Remainders to the other Brothers, *ut ſupra*; Remainders to the right Heirs of *A.* And as to the other third part in truſt for *B. H.* and the Heirs Males of his body, with the like Remainders to the reſt of the Brothers, *ut ſupra.*

A. died in 1652.

E. the Wife of *A.* died in 1673. and then the term of 200 years commenced.

20 *Novemb.* 1675. *D.* the ſurviving Truſtee at the requeſt of *H. H.* aſſigned the term to one *Marriot.*

1 *Dec.* 1675 *Marriot* aſſigned the term to *H. H.*

24 *Octob.* 1675. *H. H.* by Bargain and Sale enrolled, ſells to *M.* to make him Tenant to the Precipe for ſuffering a Recovery.

25 *Octob.* 1675. The uſe of the Recovery declared to be to *H. H.* and his Heirs.

Nov. 1677. *T. H.* the eldeſt Son of *A.* died without Iſſue or having ever been married.

Query. *If the Truſt to* H. H. *be good, and the other Truſts limited to the other Brothers on the Contingent, in caſe* T. H. *died, whereby the*

the Honour of A. *ſhould deſcend to* H. H. *be good or void, relievable or not relievable in a Court of Equity, the Term being ſurrendered?*

I am of opinion, that the Truſts to all the Brothers of *H. H.* in his term are void, and no ways relievable in Equity: For if theſe Limitations, being made after *T. H.* ſhall die without Iſſue Male of his body, were good in their Original Creation to the Brothers of *H. H.* it muſt be by the attendancy of the term upon the Reverſion of the Eſtate which was ſo intailed, and then when their Eſtates in remainder were docked by the recovery which *H. H.* ſuffered, and the Truſts that attended on them were likewiſe deſtroyed, and can never ſurvive the Remainder on which they depended, no more than they could have ſtood alone in their Original Creation. *Serjeant* P------ton's *opinion* 26 *Dec.* 1677.

I conceive that the Truſt for the term is appointed to wait upon the Inheritance in the forepart of the Deed, though ſeeming contrary to the latter part is not ſo, but both may be reconciled (that is to ſay) ſhall wait upon the Inheritance upon ſuch Contingencies as hereafter is expreſſed, being the Truſt is limited and in the ſame order, onely the Contingencies of the death of *T. H.* without Iſſue, *&c. pront.* *Serj.* M--d's *opinion* 28 *Dec.* 1677.

The Truſt of the term limited to *H. H.* and the Heirs Males of his body, with Remainders over as this Caſe is, I think is a good Truſt, and will go accordingly, ſo long as there is no charge made, though regularly a Term for years cannot be entailed, yet it may be made to wait upon the Inheritance that is intailed.

But when it is ſo limited, 'tis not properly an Intail within the Statute *de donis*, but governable partly in Equity, and partly in Law.

H. H. to whom it is ſo intailed may diſpoſe of it, and thereby bind his Iſſue without Fine and Recovery, as I conceive. And the Term ſo limited Intail, ſhall be ſubject to his Debts againſt the Iſſue Intail, as I alſo conceive.

By the Recovery ſuffered by *H. H.* all the Intails are barred, and conſequently the waiting of the Term upon the Inheritance deſtroyed, becauſe the Inheritance it ſelf is changed; but the bare ſurrender of the Truſtee could not have that operation if nothing elſe had been in the Caſe.

But the greateſt queſtion in this Caſe, I conceive, will ariſe upon the death of *T. H.* without Iſſue and the other Contingencies, becauſe the Truſt of the term is not limited to *H. H.* abſo-

abſolutely, but to ceaſe upon thoſe Contingencies, and then to be altered; yet ſeeing the main intention of the Settlement was to make the Term wait upon the Inheritance, as by the recital of the Deed, and when it changes is limited by way of Inheritance.

Therefore I conceive that *H. H* whilſt he was owner of the Inheritance and truſt of the Term, ſuffered a Recovery, the Contingent truſt of the Term to the others are deſtroyed.

In Law they have no Relief, becauſe the Eſtate for years is ſurrendred, and I conceive the Chancery will not ſupport ſuch leaping Limitations of a Term for years, eſpecially when it cannot take effect in *toto*, as the contingent Limitations are, and the Remainders in that caſe will be void. *M----d.*

Sir William Jone's *opinion* 20 Jan. 1677.

I am of opinion that the Term being limited to *H. H.* and the Heirs of his body under other Limitations than the Inheritance was, the whole term veſted in *H. H.* and the Limitations thereof to the other Brothers were void: For a Truſt of a Term cannot be intailed unleſs it be to attend an Inheritance; and the limitations of the Truſt differing from the limitations of the Inheritance, 'tis all one as if the Truſt of the Term was limited, without reſpect to any Inheritance, in which Caſe the limitations of the Term to the other Brothers would be clearly void. Next I take it to be clear, that taking the Truſt of the term to be attendant to the Inheritance of the Recovery, having barr'd the Remainders of the other Brothers as to the Inheritance, the Truſt of the term muſt needs be wholly in *H. H.* and that the other Brothers can never claim the ſame in Equity; For ſince the Inheritance (as intendant to which they could only be entitled to any part of the Truſt of the term) is veſted wholly in *H. H.* and no remainder left in the Brothers, there can be no Remainders in any of them of the Truſt of the term; but as the whole Inheritance is now in *H. H.* ſo doth the whole Truſt attend that Inheritance.

W. Jones.

Sir William Jones's *opinion* 30 Oct. 1680.

I am of opinion, that the now Duke of *Norfolk* and Earl of *Arundel*, have a good Title to the ſaid Baronies. Firſt, in Law 'tis clear, that the Term is ſurrendred; and ſo if any Title remain to the younger Brothers, it can onely be in Equity. And Secondly, I think there is no Title in Equity, as to which it may be inſiſted upon, that if the Limitations of the Truſt of the term were at firſt good; yet ſeeing they are chiefly to attend the Inheritance, and that Inheritance by the Recovery is

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changed and made a Fee Simple, and this before the Contingency in the limitation of the Truſt of the Term happened, whereby the limitations of the Truſts are changed, and the younger Brothers cannot have the Term in the ſame plight, nor during the ſame Eſtate, as were at firſt deſigned. I ſay, from theſe Conſiderations it may be concluded, that the limitations of the Truſt of the Term are deſtroyed; but that which I do moſt rely upon, is, that the firſt limitation of the Truſt of this Term under this Contingency, was altogether void; as to which, the Caſe is no more than that a Term of 200 years is granted in truſt, that *H. H.* and the Heirs of his body ſhall receive the Profits, until by the death of *T. H.* and the failure of Iſſue-Male of his body, the Honour of *A.* ſhall come to *H. H.* and in caſe the Honour of *A.* ſhall deſcend to *H. H.* then the Truſt for him and the Iſſue-Male of his body to ceaſe; and then 'tis limited reſpectively to the younger Brothers, and the Heirs Males of their reſpective bodies; I conceive theſe limitations to the younger Brothers are void. Firſt, it will be agreed, that the limitation of the Truſt of a Term to one and the Heirs-Males of his body, and for want of ſuch Iſſue to another is void. As to the Second, I think it as clear, that if a Truſt of a Term be limited to one, as long as *John a Styles* hath Iſſue of his body, and that *John a Styles* die without Iſſue of his body, then to another that Remainder is void: Likewiſe that which ſeems to make the doubt in this preſent Caſe is, that the Contingency muſt happen within a Life (*viz.*) the Honour of *A.* deſcend to *H. H.* which muſt be to him in his lifetime, or not at all. To which I anſwer, that though a Contingency be remote in it ſelf, and not likely to happen within a Life, the time within which it ought to happen, or not at all; doth not alter the caſe, and therefore in *Child* and *Bayly*'s Caſe, reported in 2*d* of *Coke*, and by *Jones* and *Palmer*, the failure of Iſſue was limited to be within a Life (*viz.*) a Term was deviſed to one and his Aſſigns, and if he die without Iſſue of his body living, at the time of his death, then to another: this was adjudged no Remainder unto that other; and though 'twas objected that the Contingency muſt happen within the compaſs of life, or not at all, yet no regard was given to that. This Caſe ſeems to me in reaſon to be the ſame with ours. I do obſerve, that no Caſe can be found, whether limitation either by way of Truſt or Deviſe of a Term hath been allowed to take effect upon a failure of Iſſue, or after death of the party to whom the firſt Eſtate was limited without Iſſue. And as in *Child* and *Bayly*'s Caſe the

Judges ſay, as I have often heard them ſay in other Caſes (that if *Matthew Maning*'s Caſe was now to be adjudged, it would not be ſo adjudged; and that caſe is) a Term is demiſed to one for life, and after his death to another, which is allowed good, and that they would not go a ſtep farther ſo. I ſay, in this Caſe it muſt go further than *Manning*'s Caſe, or any other Caſe that adjudged to make it void. *William Jones.*

*Serj.*M---d's *opinion* 20 Nov. 1680.

The Caſe is new, and without any expreſs Preſident, and therefore not capable of ſo certain a determination as would be expected, in caſe advice were to be given, whether a Purchaſer ſhould deal in the buying of a Leaſe or not.

Yet though there be no Preſident in point, yet ſuch-like Caſes have been determined as guide my Judgement and Opinion to be (*ſcilicet*) that as this Caſe is circumſtantiated, *Charles* hath not, nor can have a right to the Truſt of the Term, the Reaſons and ground of my Opinion is as followeth.

Firſt, The Truſt of the term for years in groſs, and ſeparate from an Inheritance, cannot be intailed in Poſſeſſion or Remainder; but yet where there is a Term for years in being, if the Inheritance of the Land be intailed with Remainders over, there the Term may be limited to wait upon the Inheritance, according to the ſeveral Intails; and ſuch limitation is good, ſo long as nothing intervenes to interrupt or diſturb it.

But I conceive is not capable of ſuch Priviledges of Intail as Inheritance is, for the Intail is confirmed by the Statute of *Weſtm. 2d de Donis*; but the attendance of the Term upon the Inheritance intailed, is not within the Statute *de Donis*, *&c.* but is a Creature of the Chancery, and in ſeveral Caſes may be deſtroyed and barred, though no Fine and Recovery or other bar be made of the Inheritance.

I conceive ſuch caſe if the Tenant intail Alien without Fine or Recovery for valuable Conſideration, the Iſſue Intail ſhall avoid the Inheritance, the Chancery ſhall never help him to avoid the Leaſe.

In this particular Caſe it is clear, that neither *Charles* nor any in Remainder, can recover this Term at Law, but onely by ſuit in Chancery; and in Chancery ſhall never recover where the limitation of ſuch a Term in being is not ſupportable in Common Law, which in this Caſe it is not, as I conceive; for take the Caſe without the Contingency, that *Henry* was Tenant Intail, Remainder to *Charles* Intail, *&c.* the Recovery

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ſuffered by *H.* would have bar'd *Charles* and the reſt of the term, as well as of the Inheritance.

But the ſole Objection here is, that the truſt of the term to *Henry* is expreſſed, that it ſhall determine *quo ad Henry* and his Iſſue, in caſe *Tho.* Duke of *Norfolk* dye without Iſſue, living *Charles*, as in this caſe he did.

The ſtrength of this Objection lies in this: Firſt, That the Ceſſor of the Truſt is to be upon the death of a Stranger without Iſſue (*ſcil.*) on *Tho.* Duke of *Norfolk*, on whom the Lands were not Intailed. And ſecondly, The term is not to ceaſe, but upon the death of *Tho.* Duke of *Norfolk* without Iſſue in the life of *Henry*.

As to the firſt, it will make no difference in Reaſon and in the pollity of the Law, where the Ceſſor is limited on the death of a Stranger without Iſſue, or of the Tenant Intail without heir of his body. For firſt,

In both Caſes the poſſibility is remote and not regarded in Law, where a term is ſo limited, and ſo were the reſolutions in *Childs* and *Bayly*'s Caſe, and divers others.

This would be a way to ſet up a perpetuity, as ſtrongly as that it was limited upon the death of the Tenant in tail without Iſſue.

Put the caſe there be Father and ſeveral Sons *A. B.* and *C.* and the Father is ſeized in Fee of the reverſion of Lands, after a Leaſe of 200 years he ſettles the Inheritance upon his eldeſt Son in tail, with Remainders in tail to his other Sons; and this Leaſe being in Truſtees for him at the ſame time, cauſes the Leaſe to be ſetled in Truſtees in Truſt for the Sons, to wait on the Inheritance in Truſt accordingly, provided that the ſecond Son dye without Iſſue in the life of the Father or Son, the Truſt of the eldeſt Son to ceaſe.

I conceive this would not be maintained in Equity, if the ſecond Son ſhould not alien by Fine and Recovery.

As to the Second Objection, that the Ceſſor is on the Death of *Tho.* without Iſſue in the Life of *Henry*, whereby the Contingency is reduced to happen in the Life of one perſon (*viz.*) *Henry*, and not at large (*viz.*) of the death of *Tho.* without Iſſue, I conceive no difference made thereby, and it is in effect the point adjudged in *Child* and *Bayly*'s Caſe which was thus: *French* a Termer for 76 years demiſes to his Wife for Life, Remainder of the Term to *W.* his Son and his Aſſigns, Proviſee, That if his Son *W.* dyed without Iſſue of his body then living, That *T.* his Son ſhould have the Term or Intereſt. *Mic.* 17. Jac. *R. B.*

Adjudged then in *B. R.* which was three years after affirmed *Mic.* 20. Jac.

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in the Exchequer Chamber by *Hobart*, *Winch*, *Denham*, *Hutton*, and *Jones*, that the Demiſe to *Tho.* was void.

In that Caſe the Contingency did expect during the life of *W.* onely as here it is on the life of *H.* and the Reaſons of their Judgments both in the Kings Bench and Exchequer-Chamber, in effect of all the Judges of *England* at that time, was becauſe it might tend to make a perpetuity, and that this new-invented way of Intailing of Terms in no ſort to be favoured in Law.

In *Child*'s Caſe 'twas limited, if *William* had no Iſſue at the time of his deceaſe; in this Caſe, if *Tho.* had no Iſſue at the time of *Henry*'s death.

Put caſe it had been limited, that *Tho.* had dyed without Iſſue in thirty or forty, or any number of years, or if it had been limited that *Tho.* had dyed without Iſſue in the Life of *Henry*, and five or ſix more perſons, it might have been ſo limited as well as to one Life, and the Law is the ſame.

It is more Contingent when the Ceſſor is limited to be upon the death of *Tho.* without Iſſue in the life of *Henry*, then it had been if *Tho.* had dyed without Iſſue generally; for he may dye without Iſſue, though he dye not without Iſſue in the life of *Henry*.

Firſt, the ſum of this is, if ſuch limitation of a Term as this is, be not good at Law, the Truſt of a Term cannot be good in Chancery.

Secondly, the general ſcope of the Settlement of the Term was, that the Term ſhall wait on the Inheritance Intail, which now cannot be, becauſe it is altered.

Again, if the Law ſhould be otherwiſe, that *Charles* have the whole Term, then thoſe in Remainder ſhall be utterly defeated of it, and ſhall not go to *Charles* his Son and Heir, but to the Executors, which was never intended by the Deed. *M----d.*

Opinions and Conſiderations for the younger Brothers.
Sir J. C---.

I conceive, that notwithſtanding the late Judgments in Chancery have been, that if a Term of years be limited by way of Truſt, or otherwiſe, to any perſon and his Heirs Males, with Remainders over, or other limitations to any other perſons, thoſe Remainders and Limitations are void, and the whole Term ſhall be to that perſon and his Executors and Adminiſtrators, to whom it was firſt limited in Tail; yet this Caſe is different from all thoſe Caſes, by reaſon this was onely a Temporary Proviſion as to Mr. *Henry Howard*, until that Contingent of the death of the Duke of *Norfolk* ſhould happen, and then abſolutely to ceaſe as to Mr. *Henry Howard*. And then the Truſt of the Term is declared to be for the preferment of the

the younger Sons, as is above expreſſed ; and albeit that *Marriot* hath in plain breach of Truſt by his Aſſignment, enabled the now Duke to deſtroy the Term in point of Law ; yet the Chancery may ſubject the Lands during the Remainder of the term to the Truſtees for the younger Children, as agreeable to the intention of the Deed of Truſt, and to all Honeſty and Equity, and that Equity I take is in no ſort bar'd by the Fine, if a Bill be exhibied in time. *J. C.* 8 Jan. 1677.

I concur with this Opinion, becauſe it is no abſolute Truſt, not ſo much as for the life of *Henry*, but a limited Truſt upon a Contingent, which as in its Creation it might, ſo in Fact, it did happen in the life-time of *Henry* ; and conſequently there is no room for any Conſtruction to be made, that the Truſt of the whole term veſted in *Henry* againſt the expreſs limitation thereof. *Sir* R. S. *R. S.*

I conceive, firſt, that if by Act executed my Lord of *Arundel* had created this term to my Lord *Dorcheſter*, and the reſt of the Truſtees in truſt for *Henry Howard* in tail, and after his death to the Brothers in tail, that had been a perpetuity, and not good for a term ; though as to that, there is a difference taken in *Tatten* and *Mollenex* Caſe, *More* 809, 810. in Chancery, by the Lord Chancellour, and the Judges aſſiſtant ; which ſeems to be reaſonable, that the firſt party that is the Ceſtiq; Truſt againſt his Iſſue, may diſpoſe of it, but not againſt him in Remainder ; for Equity preſerves it as to the Remainder, ſo then if it had been to *Henry Howard* and the Iſſues of his body, the Remainders to the Brothers : Though *Henry Howard* could, as to his Iſſue, diſpoſe of it, yet as to his Brothers it ſtood good, if that Reſolution holds good, and the Books ſays it was grounded upon preſidents in that Court too. But this caſe differs where the courſe of Equity is againſt it ; therefore, firſt there is onely by this Conveyance a reception of the profits in *Henry Howard* and the Iſſue Male of his body, until the Dignity of *Arundel* come to him. And it is not in truſt for him and his Iſſue Male ; ſo as he has not the entire truſt in him, as the other Sons have by the penning of the Deed. Secondly, 'tis not abſolutely in truſt in him and his Iſſue Male, but temporary in them, upon the falling of the Dignity of *Arundel* ſooner or later, and he is not a Ceſtiq; truſt within any of the Statutes proceeding in the Statute of Uſes, but has but a limited purſuance of the profits ; but the truſt veſts compleatly in the Brothers after. Thirdly, then the Marqueſs of *Dorcheſter* aſſigns *Mr.* Offley.

the term to *Marriot*, and he aſſigning to *H. H.* whereby he has in ſtrictneſs of Law extinguiſhed it, whereby there is a wrong and deceit done to the Brothers, he is bound in equity and good Conſcience, to make them recompence and ſatisfaction for this wrong; and it appearing that *H. H.* was privy to this, with a deſign to extinguiſh it, and that extinguiſhment turning to his advantage, he is likewiſe compellable in Equity to anſwer it out of his Eſtate, either by creating a new Term in this Land, or by ſome other way, according to the Reſolution of the Judges in my Lord of *Ormon's* Caſe, *Hubbard* 350.

Sir W. Ellis. I have ſeen the Opinions of Mr. Attorney-General, Serj. *Maynard*, and Serj. *Pemberton*, whoſe Opinions I do much value, and have great eſteem for. Mr. Attorney ſaith, that the Term to *H. H.* and the Heirs of his body, under other limitations than the Inheritance was, the whole Term veſted in *H. H.* and the Limitations thereof to the other Brothers are void, I conceive the whole truſt of the Term is not limited to *H. H.* but part of the Truſt, ſo long as *Thomas* the deceaſed Duke ſhall have Heirs Males of his body, and until the Earldom comes unto him; ſo as the Truſt is but a qualified and limited Truſt in *H. H.* ſo as this Truſt to *H.* is now ended by way of limitation to *H. H.* and then there is a new Truſt ſprings and ariſes to the younger Brothers, not by way of Remainder of a term, but the Truſt to *H. H.* being ended and determined, I conceive a new one may well ariſe and ſpring up to the younger Children, admitting it were a truſt of a term in Groſs, it is not a Remainder, but a future Contingent grant and a limitation to them, as it is in *Pell* and *Browns* Caſe.

Secondly, If it be to attend the Inheritance, then he conceives clearly, the Recovery having barred all Remainders, the Term and the truſt of the Term is alſo barred. If this Truſt had been to wait upon all the Eſtate as they came in poſſeſſion, it had been the ſtronger; but as this Caſe is, I conceive the Truſt will wait upon the Eſtate of *H. H.* for ſo long as *Tho.* lives, and hath Heirs Males of his body, and until the Earldom come unto him, and the Truſt of *Henry* determines, and then a new Truſt ſprings up to the younger Children, which is a future contingent truſt, ſo as a common Recovery can bar this Truſt, ſo long onely as they did wait upon the Eſtate of *H. H.* which is now determined by a collateral Limitation, and the Recovery cannot enlarge the Truſt to *H. H* and make that to continue which in its Creation was to end when ſuch a Contingent happens, which hath now hapned if *H. H.* had not ſuffered

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ed a common Recovery, he had had an Eſtate-tail, yet no Truſt, this is a future contingent Truſt to the younger Children, which cannot be barred by a common Recovery.

W. Ellis, 8 Martii 1677.

1. The Surrender or Grant of the Leaſe for 200 years to *Henry*, nor the extinguiſhment of the legal Intereſt of the term, doth not prejudice the equitable Truſt of the term, ſo long as the Lands comes not into other hands (*viz.*) of a Purchaſer, without notice of the Truſt, which is not in this Caſe. *Serj.* M----d *for the Brothers.*

2. An Intail cannot be made of a term in Groſs, as if a Leaſe for 1000 years be made in truſt for *J. S.* and the Heirs of his body, with Remainders over, *J. S.* may diſpoſe of the whole term, and ſuch diſpoſal is good againſt his Iſſue and thoſe in Remainder; and if he die without ſuch diſpoſition made by him, his Executors ſhall have the benefit of the Truſt, and not his Iſſue or the Remainder.

3. But a Term may be limited to attend and wait on the Inheritance by way of a truſt, as if a long term of years be the Reverſion in Fee, if the Reverſion be purchaſed in Fee, or ſetled in tail, the term may be ſetled to the uſe of the Fee or Tenant intail; and in that caſe, if the Tenant intail die, or the Tenant in Fee die, the Heir or Iſſue ſhall have the benefit of the truſt, and not the Executors, *&c.*

4. But in that Caſe, if the Tenant in Fee die in debt, and no other ſufficient Aſſets to pay the debt, in that caſe the Executor ſhall be preferred before the Heir, although the debt be ſuch as the Heir is not bound or liable unto.

5. And I conceive, that in that caſe, if the Tenant intail, that hath the Equity of a term waiting on it, do purchaſe the term and alien, or obtain the Truſtee of the term to make an alienation of the term, it ſhall bind the Iſſue intail and him in Remainder, though the Alienation be by Deed without Fine or Recovery, becauſe the term in Law is well aliened without Fine, *&c.* And the Statute of *Weſtm.* 2*d de bonis* extends not to a Caſe of a term.

6. Yet it is true, this doth not abſolutely determine the Caſe in queſtion upon three accounts.

Firſt, It is a new Caſe not yet brought in queſtion.

Secondly, Becauſe here is a ſpringing and a new truſt by accident ſubſequent, and alters the Truſt, and changes the Intail of the term to other perſons, from *Henry* to the younger Children,

dren, and on ſuch accident takes away the Truſt wholly from *Henry* the firſt Tenant in tail.

And *Thirdly*, the Change ſeemeth to be grounded on great reaſon; for the Lord *Maltravers* being in ſuch condition as he was in, there was great reaſon to diſable him and provide for the younger Children, as is done by this Caſe; and if *Henry* ſhould come to be Earl, and have addition of Eſtates, that the other younger Children ſhould alſo have acceſſion of Eſtate to them, and ſo it is by this Deed of truſt provided.

But notwithſtanding theſe reaſons, and this difference of the Caſe in theſe circumſtances from other Caſes already reſolved, and the contrary Opinions that I have ſeen, I am rather of the opinion, that in this Caſe the younger Brothers are bound by the Recovery ſuffered by *Henry*, than convinced that they are not bound; for I find that the Reaſons given *e contra*, touch not my doubt fully.

The Reaſons of my Opinion are (*viz.*)

1. For the Recovery ſuffered, and the time when it was ſuffered (to wit) before the Lord *Maltravers* dyed; for till he dyed, *Henry* was Tenant in tail, and had power by a Recovery to bar and diſpoſe of the whole Inheritance, as well of his his own Eſtate tail, as of thoſe in Remainder: The term of years was but acceſſary to ſerve and attend the Inheritance which was principal.

2. And the onely reaſon that made ſuch intailing or limitation of the term good, was, becauſe it was to wait on the Inheritance, firſt to *Henry* in tail, and ſo ſucceſſively to the other Brothers; or elſe, as it is aboveſaid, the limitation had not been good: And when that reaſon fails, and the cauſe why it was a good limitation ceaſeth and is taken away, the effect of it doth likewiſe ceaſe.

3. The change of the term into thirds, doth not change the Eſtates tail of the younger Brothers, and cannot ſtand with the intention of the Deed of Truſt: For I think it clear, if *Charles*, admitting he come to the Inheritance as owner, or if in the life of *Henry* he could get a Tenant of the Freehold of all, or any part of the Land to joyn with him, ſhould then ſuffer a Recovery, it would bar *Edward*, *Francis*, and *Bernard*, of ſo much of the third part whereof ſuch Recovery ſhould be ſuffered, *viz.* of the whole Inheritance, and a third of the term and the reſidue (to wit) the other two parts would reſpectively ceaſe, and be intailed as to the term, and be wholly in the reſpective diſpoſition of *Edward* and the reſt, and go to their Executors, not to their Iſſues or the Remainders.

And

And yet upon long conſideration of the Caſe, there is another, and a further ground of my doubt of what hath been ſaid (*viz.*) not onely becauſe it is a new Caſe, and concerneth a Great and Noble Family, but on another and further ground obſerved and inſiſted upon by ſuch great Opinions, contrary to what I have above obſerved (*viz.*) that it is not onely a ſpringing and contingent uſe to the younger Brothers, reſpecting them but becauſe the Original Truſt to *Henry*, *viz.* that the Truſt to him and his Iſſue is, as to him and them, under a Limitation; and that not ſo long as he the Tenant in tail ſhall have Iſſue, but ſo long as the Lord *Maltravers* ſhall have Iſſue Male, and on that reaſon the Caſe is more doubtful. *M----d.*

1. I agree, that if a man have a term for a 1000 years, and he grants and demiſeth this to one and the Heirs Males of his body, the Remainder to another and his Heirs, that this term cannot be intailed, nor a Remainder limited upon it; and that upon the death of the party to whom the term was ſo given, it ſhall go to his Executors as a Chattle, and not to his Heirs Male. *Sir* W. Ellis.

2. I do conceive it will not be denied by any, that if there be a long term for years, for a 1000 years, more or leſs in truſt, and a man purchaſes or ſettles the Inheritance to the uſe of himſelf for life, the Remainder in Tail, the Remainder in Fee, and declare that the truſts of the term ſhall wait upon thoſe Eſtates, and fall in with them. But that this truſt of the term ſhall go along with all the Eſtate, and ſhall not be merged in any of them, and this truſt ſhall not go to an Executor, but ſhall go along with the Eſtate, and if the tenant in tail dye without Iſſue, it ſhall go along with the next Remainder man in tail, and after his death without Iſſue, it ſhall go to him in Fee ſimple, and attend all the Eſtates in Remainders, be they never ſo many. And this, I conceive, is the common courſe in Chancery to incorporate ſuch truſts to go with all the Eſtates. This is not an abſolute Truſt for *Henry* and the Heirs Male of his body, but a limited and qualified Truſt as long as Duke *Thomas*'s elder Brother lived, and hath Heirs Males of his body, and until the Earldom of *A.* doth come unto him; ſo as by the death of Duke *Thomas* without Iſſue, the Truſt to *Henry*, which was but a limited Truſt, is now determined and vanquiſhed as to *Henry*.

As this was a contingent truſt in *Henry*, but in Caſe *Tho.* was alive, and had iſſue when the term was to begin, ſo the continuance and duration of the truſt of the term, was but to laſt

until the Earldom came unto him; and it is the ſtronger, for that this truſt ends in *Henry* by way of Limitation.

Query. How long ſhall *Henry* and his Iſſue have this Truſt?

Anſw. Until *Thomas* die without Iſſue Male, and the Earldom of *A.* come unto him, both which hath happened, ſo as the truſt for *Henry* and his Iſſue is ended by way of limitation, and is now diſpoſed over to others, as it may well be ſo, as this is a new Truſt that by a contingent ſubſequent Declaration takes away the Truſt from *Henry*, and ſettles a new Truſt in the younger Children; and it is to be conſidered, that *Henry* is to have the Truſt of this term, not ſo long as he ſhall have Iſſue, but ſo long as the Lord *Maltravers* ſhall have Heirs Male, ſo as that makes it a collateral Limitation or Determination of the ſaid Eſtate.

4. The Equity and Juſtice of this Truſt carries much weight with me, and that condition the Lord *Maltravers* was in: It was fit to ſettle the Truſt in *Henry*, ſo long as the Lord *Maltravers* had Heirs Male of his body, and if they failed, and that the Earldom of *A.* and great acceſſion of Eſtate to come to *Henry*, it was a great reaſon that the younger Children ſhould be provided for and taken notice of.

And it will not be eaſie to blow off and overthrow a Truſt in a Court of Equity, contrary to the expreſs mind and intention of him that made it, for the proviſion of the younger Children, eſpecially it being made with ſo much Juſtice and Reaſon, wherein he hath both a reſpect for his Honours Family and younger Children.

Obj. There is one Objection againſt all I have ſaid, which ſeems *prima facie* to carry weight with it; and that is, when the legal intereſt is come to *Henry*, and he is Tenant intail in poſſeſſion, and ſuffers a common Recovery, and bars all the Remainders Intail.

Query. How can this truſt which is an Acceſſary follow Eſtates?

Anſw. To which I anſwer firſt, If the Truſt had been to follow and wait upon the Eſtate, this Objection had been the ſtronger; but this truſt is not abſolutely to wait upon *Henry*'s Eſtate, but ſo long as Duke *Thomas* hath Heirs Male of his body, and until the Earldom of *A.* come to him, both which are happened, he continues ſtill Tenant Intail, and yet this Intereſt is determined in the truſts.

Secondly, this is a future contingent Intereſt that now is happened to the younger Brothers, which cannot be barred, and it may be reſembled to *Pell* and *Brown*'s Caſe, 2 *Cro.* 590, 591.

A man demiſeth his Land to his ſecond Son *Thomas* and his Heirs, and if he die without Iſſue, leaving *William* his elder Brother, then *William* ſhould have it in Fee; it was adjudged that this was a Fee Simple in *Thomas* the ſecond. And though regularly one Fee cannot deſcend on another; yet this being a future contingent Intereſt that the Deviſe of the Fee Simple to *William* his eldeſt Son.

Another great Queſtion was, *Thomas* the ſecond Son ſuffered a common Recovery, whether this did not bar the future contingent poſſibility of *William?*

And it was adjudged it did not.

Now here is as much a future contingent poſſibility of a Truſt, as there was of an Eſtate and more, and therefore there is much reaſon that the future contingent poſſibility of a Truſt ſhould not be barred by a common Recovery, as in that Caſe. And as to that which is ſaid, that an Acceſſary cannot be without a ſubſtance, and the Eſtates of the younger Children is to ſucceed, and yet they have no proper Eſtate, for *Henry* is now Tenant, ſo as this is a perſonal truſt for the younger Children independent of their Eſtates; and if ſo, then clearly this Recovery cannot bar their Eſtates.

Another reaſon why a Court of Equity ſhould help and interpoſe in this Caſe, may be, becauſe the Eſtate for years was conveyed by *Marriot* in breach of the Truſt, which a Court of Equity ought to maintain and ſupport as much as they can.

Firſt, Becauſe *Marriot* and the now Duke are not Purchaſers for a valuable Conſideration.

Secondly, They came in with privity and had notice of the Truſt.

And I conceive may and will, notwithſtanding theſe Acts, make good theſe Truſts for the younger Children; and if this be a new doubtful Caſe, certainly I conceive it is the ſureſt and ſafeſt way for a Court of Equity to make good the intention of him that made it, and to preſerve the Truſt for the younger Children.

William Ellis 26 *Feb.* 1677.

De

De Termino S. Hill. Anno Reg. Car. *2d Regis* XXXIII *&* XXXIV *Anno Dom.* 1681. *Martis* 24 *die Jan. in Curia Cancellarii.*

Howard, *verſus Le Duc de* Norfolk, *& al.*

THis day being appointed for Judgement in this Cauſe, the three Judges aſſiſted the Lord Chancellor at the hearing, *viz.* the Lord Chief Juſtice *Pemberton*, the Lord Chief Juſtice *North*, and the Lord Chief Baron *Montague*, came into the Court of Chancery, and delivered their Opinions *Seriatim*, beginning with the Lord Chief Baron *Montague*, and ſo upwards; after whom the Lord Chancellor alſo delivered his Opinion: The ſum of all the Arguments, as near as could be taken, were as followeth.

The Argument of the Lord Chief Baron Montague.

Charles Howard is Plaintiff, and the Duke of *Norfolk* and others are Defendants. The Plaintiff by his Bill ſeeks to have Execution of a Truſt of a term of 200 years of the Barony of *Groſtock*, which was made by *Henry Frederick* Earl of *Arundel*, and upon the Bill, Anſwers, Deeds, and other Paſſages in this Cauſe contained, is this:

Henry Frederick Earl of *Arundel* by Leaſe and Releaſe of the 20*th* and 21*th* of *March*, 1647. did ſettle the Barony of *Graſtock* and of *Burgh*, and ſeveral other Lands to himſelf for Life, then to the Counteſs *Elizabeth* his Wife for life, and then there is a term created for 99 years (which we need not mention in this Caſe, becauſe it is determined) and after the death of the Counteſs, there is a term for years limited to my Lord of *Dorcheſter* and other Truſtees for 200 years, under a Truſt to be declared in a Deed of the ſame date, with the Releaſe and the limitation of the Inheritance, after this term of 200 years, is firſt to *Henry Howard* now Duke of *Norfolk* and the Heirs Males of his Body, then to Mr. *Charles Howard* the now Plaintiff, Brother of the ſaid *Henry*, and ſo to all his Brothers ſucceſſively intail Male, with the laſt Remainder to the Earl of and his Heirs, then by a Deed 21 of *March* 1647, the Earl declares the Truſt of the term of 200

years, reciting first the uses of the former Deed, and therein says, it was intended that the said term should attend the Inheritance, and the Profits of the Barony of should be received for 200 years by *Henry Howard* now Duke of *Norfolk* and the Heirs Males of his body, so long as Lord *Thomas* eldest son of the said Earl of *Arundel*, or any Issue Male of his body should be living; but in case he should die without Issue Male in the life of *Henry Howard*, not leaving his Wife ensient with a Son, or in case after the death of *Thomas* without Issue Male, the Honour of the Earldom of *Arundel* should descend to *Henry Howard*, then he and his Issues to have no benefit of this term of 200 years, but it was to descend to the other Brother *Charles Howard* the now Plaintiff as hereafter is mentioned; and then comes *Now this Indenture witnesseth*, and therein the Earl declares that it should be under the Limitations after specified (*viz.*) if *Thomas* Lord *Howard* had any Issue Male or Heirs Male of his body (living *Henry Howard*) then the Trustees should have the commencement of the term in trust for the said *Henry Howard* and the Heirs Males of his body, till such time as the Earldom should come to *Henry Howard*, by the death of *Thomas* without Heirs Males of his body, and after to the other Brothers successively, and the Heirs Males of their bodies; and then doth divide the other Manors with cross Remainders to the five Brothers, then the Case goes on thus, the Earl of *Arundel* dies in time in 1652, *Elizabeth* the Countess dies in 1673, then in 1675, my Lord of *Dorchester* the surviving Trustee, assigns the Term to one *Marriot*, he assigns it to the now Duke of *Norfolk*, and the Duke the 24*th* of *Octob.* 1675, by Bargain and Sale makes a Tenant to the Precipe, and then a Recovery is suffered, and the Uses of that Recovery 25*th* of *October* are declared to be to the Duke and his Heirs. Then *Thomas Howard* the former Duke died without Issue, having never been married, and that is in the year 1677, whereby the Honour came to the now Duke, and so the Plaintiffs Bill is to have execution of the Trust of the term of the Barony of to the use of himself and the Heirs Males of his body. This I conceive was opposed by the Counsel for the Defendant upon these grounds.

1. That by the Assignment made by *Marriot* to my Lord Duke *Henry*, the Term was surrendred and quite gone.

2. The second ground was the common Recovery suffered, which they say barred the remainders which the other Brothers had, and so also would be a bar to the Trust of this term.

3 And

3. And the other ground was, that the Truſt of a term to *Henry* and the Heirs Males of his body, until by the death of *Thomas* without Iſſue, the Earldom ſhould deſcend upon him, and then to *Charles*, is a void Limitation of the Remainder.

As to the firſt, that by the aſſignment of *Marriot* to *Henry Howard*, the whole Term was ſurrendred; and being ſo ſurrendred, hath no exiſtance at all that I find, but was barely mentioned, and I think cannot be ſtood upon; for this the term by the ſurrender is gone indeed and merged in the Inheritance, yet the Truſt of that term remains in Equity; and if this Truſt be deſtroyed by him that had it aſſigned to him, this Court has full power to ſet it up again, and to decree the term to him to whom it did belong, or a recompence for it; therefore I think that ſtands not at all as a point in the Caſe, or as an objection in the way.

As to the next thing, the common recovery now ſuffered by the now Duke, that doth bar the remainders to the other Brothers: And ſo alſo the truſt of this term, that I conceive, to be ſo in caſe this can be interpreted to be a term to attend the Inheritance; and indeed in the reciting part, the Deed doth ſeem to ſay, that it was intended to attend the Inheritance. But by that part of the Deed which followeth after (*now this Indenture witneſſeth*) there it is limited, that the term ſhould be to *Henry Howard* and the Heirs Males of his body, until ſuch time as the Honour of the Earl of *Arundel* by his elder Brothers death without Iſſue, ſhould come to him; then to the Plaintiff, which doth convey the Eſtate of the term in a different Channel, from that in which the Inheritance is ſetled; and taking this Deed altogether, it doth limit this term in ſuch various Eſtates, that it can no way be conſtrued to be a term attending the Inheritance; and then, I conceive, the recovery doth not bar the truſt, for the recovery would bar the incident to any Eſtate, as this would do here, if it attended the Inheritance; but being onely a term in Groſs, and a collateral thing, I conceive the recovery has no operation to bar the truſt in the term. Then the Caſe ſingly depends upon the third point, whether the Truſt of a term thus limited to *Henry Howard* and the Heirs Males of his body, until his Brother die without Iſſue, whereby the Honour came to him with ſuch contingent Remainders over, be a good Limitation, this is the Queſtion, and ſo in ſhort the Caſe is but thus: A Term of Two Hundred years is granted in truſt, that *Henry Howard* and the Heirs Males of his body ſhall receive the Profits

fits until *Thomas* die without Iſſue Male of his body, and then to *Charles Howard*, and the Heirs Male of his body: And in this caſe, I am of Opinion, that theſe Limitations to the younger Brothers upon this Contingency, are abſolutely void in the firſt Creation, and are gone without the Surrender; and that upon this Recovery *Henry Howard*, now Duke of *Norfolk*, ought to have the truſt of the whole Term.

Limitacion d'vn Terme comment poet estre

The Expoſitions of Devizes of Terms, or the Diſpoſitions of the Truſt of Terms, have proceeded by many ſteps to higher degrees than was at firſt thought of by the makers. It would be too long to give a diſtinct Hiſtory of it; but it is ſo plain, that it is now a reſolved and decreed thing and ſetled, therefore it were in vain to tell you the ſteps taken towards it. That the devize of a Term, and the limitation of the truſt of a Term to one and the Heirs of his body is good, though *Burgeſſes* Caſe was onely for Life, the Caſes are very full in it. On the other ſide, where there is a limitation of a Term to one and the Heirs of his body, there a poſitive Limitation of the Eſtate over, after his death without Iſſue, that I think alſo is as fully declared to be void. I ſhall not cite Caſes at large, but onely thoſe Points and Expreſſions in them which are peculiar and pertinent to this purpoſe: there is *Jinkins* and *Kenniſh*'s Caſe, I think it was in the Exchequer, there it was ſaid, it was ſuch a total Diſpoſition of the term, to limit it to one and his Heirs Males, that it would not admit of a Limitation over, but adjudged to be void. So in my Lord *Rolls* Abridgments, 1 *Part Tit.* Deviſe *fol.* 611. 11 *Car.* 1. *Leventhorp* and *Aſhby*'s Caſe *B. R.* It is ſaid, that the Remainder of a Term to *C.* after it is limited to *B.* and the Heirs Males of his body, is a void Remainder; and *fol.* 613. he puts down the reaſon why the Remainder is void, becauſe the Limitation to one and the Heirs Males of his body is a full diſpoſition of the Term. And if ſuch Limitations over were permitted, it would create perpetuities, which the Law doth abhor.

Devise d'Term al A et al Heirs d'son corp ext bone — — mes nul limitacion vlt poit voile estre bone

Sanders and *Corniſhes* Caſe *Croke fol.* 230. There it is reſolved, that the Deviſe of a Term in ſuch a manner with Limitations after one another, to make a perpetuity, cannot be good: For, ſays the Book, to limit a poſſibility, and to limit the Remainder of a term, after a dying without Iſſue, ſtands not with the Rules of Law. Now to bring this Caſe within theſe Rules, that if there be the Truſt of a term to a man and the Heirs of his body, no Limitation can be over. I ſay then, if this Eſtate be ſo limited to my Lord Duke by the

name

name of *Henry Howard*, the other will follow when there is a Limitation Intail, (though it cannot be properly ſtiled Intail of a Term, yet it is a Diſpoſition of that Term as long as the Tail laſts) then there can be no Limitation over. And as to that I think, as the Deed is penned, it may well be ſtood upon, that here is an Eſtate given to *Henry* and the Heirs Males of his body: For though the Deed ſays, until by the death of *Thomas* without Iſſue, the Earldom of *Arundel* ſhall deſcend upon him, yet the firſt Limitation, I think, ſhall ſtop at the Heirs Male of his body, and the Remainder over ſhall be then void. But I will not ſtand upon that, becauſe I think I ſhall not need it, but admit (until by the failure of the Iſſue of *Thomas* the Earldom come to him) makes it not an Eſtate to *Henry* and the Heirs of his body directly, yet it gives an Eſtate to him and the Heirs of his body, as long as *Thomas* has any Iſſue of his body, and that I count to be all one as to the Operation of Law; for each of the Eſtates muſt determine upon the perſons dying without Iſſue, which is too remote a Condition to limit the Remainders of a Term upon. And this until he die without Iſſue, and as long as he ſhall have Iſſue, are terms Synonimous in my Opinion; and ſo, it being a Limitation to him and his Heirs of his body, as long as *Thomas* liveth, and hath Iſſue of his body, it cannot be limited over, and the rather upon comparing the former part of the Deed, where there is an expreſſion, that it was intended the Eſtate ſhould remain in my now Lord Duke, ſo long as *Thomas* lived, or had any Iſſue of his body. Therefore, I ſay, there being in my opinion no difference as to operation of Law, between the Limitations to a man and the Heirs of his own body, and to a man and the Heirs of his body, during the life of another and the Heirs of his body, there can be no difference in the reſolution. It is as poſſible a diſpoſition of the Term during the continuance of an Intail as the other, and therefore no Remainder can be limited over.

But now the doubt in this Caſe, that is made, ariſeth upon this point, that this Limitation over to the Brothers, is upon a meer Contingency, and whether that be good, I think, is the main Queſtion. And truly upon the reaſons of *Child* and *Baily*'s Caſe, I cannot think it is a good Limitation; that Caſe has been ſo often reported, that I need not put it at large. In ſhort, this it was; A Deviſe by *A.* of a Term to *William* his eldeſt Son and his Aſſigns; and if he die without Iſſue, then to *Thomas* his youngeſt Son: there the Judges of the Kings-Bench did firſt deliver their Opinion, that this was a void Li-

mitation to *Thomas*. And after it came into the Exchequer-Chamber, and there, by the Opinion of ten Judges, it was affirmed, and the reaſons of the Judgement are not what was alleadged at the bar in this Cauſe; but they went upon the ground, becauſe thereby a perpetuity would enſue; and that which was obſerved by one of the Councel, that the Term was given to him and his Aſſigns, was onely an Anſwer to a Caſe put in the argument upon *Child* and *Baily*'s Caſe, which was the Caſe of *Rhetorick* and *Chappell*, Hill. 9 *Jac.* R. 889. B. R. which was cited by my Lord Chief Baron *Tanfield*, againſt the reſolution of *Child* and *Baily*'s Caſe, to difference it from the Caſe then before them. And though it was urged in *Child* and *Baily*'s Caſe, that it was given upon a Contingency to the younger Son, which would ſoon be determined, and end in a ſhort time; yet that weighed not with the Judges, but that they ruled it to be a void Limitation; and I met lately with a Judgement in the *Common-pleas*, which croſſeth that Caſe of *Rhetoricks* and *Chappell*'s, it was *Hill.* 31 and 32 *Car.* 2. *Reg.* 1615, *Gibſon*'s and *Sanders*'s Caſe; *Matthews* poſſeſſed of a long Term of years, having Iſſue a Son and three Daughters, makes his Will, and deviſes his Chattel-Leaſes to his Son, and if that Son die before Marriage, or after Marriage without Iſſue, that then they ſhould go to the Daughters. The Son doth Marry, and dieth without Iſſue, the Daughters his Executrixes, againſt whom an Action of Debt is brought upon a Bond, they plead no Aſſets; and upon a ſpecial Verdict, the Queſtion being whether this were Aſſets in their hands, it was adjudged it was.

In the report of that Caſe, there are many expreſſions of the Courts unwillingneſs to extend theſe Deviſes and Diſpoſitions of Terms, further than the Judges had gone already. The authority of this Caſe doth much ſtrengthen the authority of *Baily*'s Caſe, becauſe it doth thwart and oppoſe the Judgement in *Rhetorick* and *Chappell*'s Caſe.

There was alſo ſtarted at the Bar in *Pell* and *Browns* Caſe, that a Fee upon a Fee, ariſing upon ſuch a proximate Contingency, as might happen in ſo ſhort a time as a Life, was a good Limitation. It is very true, that Caſe is ſo adjudged; but I think there might be ſuch reaſon of difference urged between the diſpoſition of a Fee-Simple, and of a Term; for a Term may be qualified as to a man and his Heirs until a marriage take effect; but the qualifying of a diſpoſition of a Term cannot be, becauſe when once a Term is given, the qualification comes too late.

I do think that there have been Cases in this Court, where a Term has been limited to one and the Heirs Males of his body, upon a Contingency, to happen first with Limitations over, if that Contingency do not happen, that has been a good Limitation. As thus; if it be limited to the Wife for life, and then to the eldest Son, if he overlive his Mother and the Heirs Males of his body, the Remainder over to a younger Son there, if the eldest Son die in the life of the Mother, the Limitation to the second Son may be good. But if there be an instant Estate-tail created upon a Term, with Remainders over, though there be a Contingency as to the expectations of him in the Remainder, yet there is such a total disposition of the Term, as after which no Limitations of a Term can be. For that Objection out of *Pell* and *Brown*'s Case, there is no such sure Foundation to build upon in the point of a Term, because that Case it self has been controverted since that Judgement given, in a Case between *Jay* and *Jay*, in *Files* Reports, 258 and 274, *Trinit.* 1651, fol. 258. 'Tis thus, A man seized in Fee devised it to one and his Heirs; and if he die during the life of his Mother, the Remainder to another and his Heirs.

There is no Opinion given; but *Rolls* Chief Justice said, a Limitation of an Inheritance after an absolute Fee-simple, is not a good Limitation, because this would be to make a Perpetuity, which the Law will not admit; but if it be upon a contingent Fee-simple it is otherwise; but *fol.* 274, where it is spoken to again by *Latch*; he argued that it was not a good Limitation; and though he doth cite and confess *Pell* and *Brown*'s Case to be adjudged quite contrary to what he argued, yet he tells you, that the Judges did find such Inconveniences arising upon it, that the Court was divided upon a like Case; and says further, that within nine years after that Judgement, 21 *Jac.* it was made a flat Query in the Serjeants Case; and adds moreover, that it hath been ever since disputable, and cites a Case and gives you a Roll, but not the Parties names, *Mich.* 37 and 38 *Eliz. C. B. Rol.* 1149, wherein says the Book, after solemn Arguments both at Bar and Bench, it was adjudged quite contrary to *Pell* and *Brown*'s Case; but admit that Case to be good Law, where will you stop, if you admit the limitation of a Term after an Estate-tail, where shall it end? for if after one, it may as well be after two; and if after two, then as well after twenty; for it may be said, if he die within 20 years without Issue, and so if within 100, and there will be no end; and so a Perpetuity will follow. It was

said

ſaid at the Bar, it will be hard to fruſtrate the intention of the Parties: To that I anſwer, Intention of Parties not according to Law are not to be regarded. It was the Intention in *Child* and *Baily*'s Caſe, that the younger Son ſhould have it; and ſo in *Burgeſſes* Caſe, it was the Intention the Daughter ſhould have it; and ſo in *Gibſons* and *Sommers*'s Caſe, it was intended for the Daughters, yet all theſe Intentions were rejected; and therefore as to that, it is not at all to weigh any thing in the Caſe.

It has alſo been objected, but then here is a contingency that has actually hapned upon *Thomas*'s death without Iſſue, and ſo the Honour is come to *Henry*, I ſay the hapning of the Contingency is no ground to judge.

The Limitation good upon it was not good, if the other Limitation had ſtood out, and that I conceive is our Caſe. So then for that I think theſe expoſitions have gone as far already as they can; for my part I cannot extend it any further, and therefore I conceive in this Caſe, the Plaintiff has no right to this Term, but the Decree ought to be made for the Defendants.

The Argument of the Lord Chief Juſtice North

I Shall not trouble your Lordſhip to repeat the Caſe again, for it has been truly opened by my Lord Chief Baron, nor ſhall I trouble you with any long Argument, becauſe I think there is but one point in the caſe, and that a ſhort one: The onely point is this, Whether this contingent Truſt of a Term limited to *Charles*, upon the dying of *Thomas* without Iſſue Male, whereby the Honour did deſcend to *Henry*, be good in point of Creation and Limitation; for the other two points will not trouble the Caſe: For as to that point of the Recovery, in caſe this being not a good Limitation in point of Creation, it will make nothing in the Caſe, for it is gone without the Recovery. In caſe it be good in point of Creation, the Recovery will do nothing; for that ſuppoſeth it to go along with the Inheritance: And if this take effect, then it will ſuffer no prejudice by the Recovery. Then for the aſſignment of *Marriot* to the Duke, that ſignifieth nothing in the Caſe; it doth indeed ſhew, that if your Lordſhip ſhall decree this Cauſe for the Plaintiff, then he hath committed a breach of Truſt; but if for the Defendant, then it is of no weight at all.

all. If the Law be for the Plaintiff, then he muſt anſwer for this breach of Truſt, and ſo muſt the Duke; for it is a ſurrender to a perſon that had notice of the Truſt. So that the Queſtion is barely upon that ſingle firſt Point, whether it be a good Limitation upon the Contingency to *Charles*, this which they call a ſpringing Truſt. My Lord, I take the Rules of this Court, in caſes of Truſts of Terms, to be the ſame with Rules of Law in Deviſes of Terms: For I conceive the Rules of Law to prevent Perpetuities; are the policy of the Kingdom, and ought to take place in this Court, as well as any other Court. So I take it then, that the Truſt of a Term is as much a Chattel, and under the conſideration of this Court, as the Term it ſelf; and therefore I cannot ſee, why the Truſt of a Term upon a voluntary Settlement, ſhould be carried further in a Court of Equity, than the Deviſe of a Term in the Courts of Common Law. It is true, where there is a long Term in being upon Mortgage, and as a ſecurity which is determined, it is of great conveniency that it ſhould be kept on foot to protect the Inheritance; and ſo it will lie ſtill to wait upon the Inheritance, and thereupon in many Deſcents it will go from Heir to Heir, and that upon a particular conſideration, to attend and protect the Inheritance: But for a meer Chattel to go from Heir to Heir, is not the ſame caſe; nor do I ſee any reaſon why this Court ſhould carry ſuch a Chattel any further, than Deviſes of terms are carried at Common Law.

Now let us ſee, and a little conſider, what thoſe Rules are, and how they are appliable to this Caſe: In both caſes a Term may be limited for life to one, with Remainders over, though in the bare conſideration of Law, an Eſtate for life is a greater Eſtate than a Term for years; but in caſe of an Eſtate-tail there can be no ſuch thing; therefore in *Burgeſſes* Caſe, the Truſt of a term is limited to *A.* for life, the Remainder to his Wife for life, the Remainder to the firſt, ſecond, and other Sons ſucceſſively, and the Iſſue of their bodies: and for default of ſuch Iſſue, to the Daughters of *A.* and their Iſſue, the Remainder to the right Heirs of *A.* *A.* had no Son at that time living, nor after; but the Remainder over was to the Daughter of *A.* in being. It was ſtrongly urged, that the Daughter ſhould have the Truſt veſted in her, and that the Truſt for the Daughter ſhould cloſe with the Eſtate for life till *A.* ſhould have a Son. But becauſe there was a Limitation to the firſt Son of *A.* and the Iſſue of his body, and the Remainder of the Daughter was but to take place, after that Son died without Iſſue, and ſo the others, though it was not to a Son then

in being. But his Eſtate was in contingencies which did never happen, yet the Court did not allow of any ſuch thing, as any Remainder that the Daughter ſhould have, but made a Decree for the execution of the Deviſee; ſo that it is clear, there can be no direct Remainder of the Truſt of a term upon an Eſtate-tail.

ngent Remd — The Queſtion then is, whether there can be any contingent Remainder for this, for this Caſe depends upon that conſideration; *i. e.* it is limited upon a Contingency, if ſuch a thing ſhould happen in the life of a man, and ſo it is a ſpringing Truſt and good that way. My Lord, I take it in this caſe, where there can be no direct Remainder, there can be no contingent Remainder, though it happen never ſo ſoon; Therefore, if a Term be limited to one and his Heirs of his body, and he die without Iſſue of his body within two years the Remainder over, there can be no ſuch Remainder limited at all, and therefore no contingent Remainder; for this Remainder is limited at the end of an Intail, and that is ſo remote a conſideration, that as the Law will not ſuffer a direct Remainder upon it, ſo upon a Contingency neither.

Now in this Caſe there is onely this difference, if the Eſtate-tail in this Term had been limited to my Lord *Maltravers*, as 'tis here to *Henry Howard* and the Heirs of his body; and if he die without Iſſue in the life of *Henry*, *&c.* then the Remainder over, then it had been clear the Contingency had been limited upon the expiring of the Intail; and though it be ſaid that it expires within the compaſs of the life of a man, yet that helps not in this Caſe at all, as I conceive; for I will put a caſe upon a Fee-ſimple (upon *Pell* and *Brown*'s Caſe.) A man limits an Eſtate in Fee-ſimple to a man and his Heirs, and if he die without Heirs during the life of *J. S.* then to *J. D.* this is void, and the Lord ſhall have it by Eſcheat, and that (though it be brought within the compaſs of the life of a man) ſhall never be a good Limitation: And if that Caſe of *Pell* and *Brown* had been, that a man deviſed Land to a man and his Heirs, whereby it would appear, that it was intended the Deviſee ſhould have had a Fee-ſimple, with a Remainder over upon a Contingency. I take it this could not be good by way of executory Deviſe, becauſe a mans dying without Heirs, which to loſe his Fee-ſimple he muſt do, comes not under the intention of the Law as of a Contingency. An Eſtate for life, in the judgment of the Law, is of longer duration than a Term for years; and the Rule in *Child* and *Baily*'s Caſe is firm, that the expiring of the Limitation of a Term

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in Tail within the life of a man, will not make good a Limitation of the Remainder over, which I hold to be a good Rule, and the reaſon of it, I conceive, will reach to this Caſe: For what is the difference? here is a Contingency indeed; but it is to have an Eſtate-tail expire within one Life, which I take to be the ſame caſe. Suppoſe the Term had been limited to *Henry* and the Heirs Males of his body, ſo long as *Thomas* ſhall have Heirs Male of his body, that would ſure have cut off the Remainder; and what is the difference? For it doth depend upon *Thomas* dying without Iſſue, whereby the Earldom ſhould deſcend, then when it is limited to *Henry* and the Heirs Males of his body. And if *Thomas* die without Iſſue in the life of *Henry*, then over this can no more abridge it, than if he had ſaid, if *Henry* die without Iſſue during the life of another man.

So that, I think, the whole Term is ſwallowed in the Eſtate-tail upon this conſideration, and there can be no Remainder of it, no executory Deviſe, nor any ſpringing Truſt to *Charles* upon this Contingency; and, my Lord, upon that reaſon, I think this Settlement fails, and is diſappointed as to the younger Brothers.

If it had been limited to *Henry* for Life onely, and no further, then let the Contingency have been what it would, that were to happen in his life, if complicated with ſeveral aſcendents, yet it ſhould be good in Remainder, becauſe the Law doth allow a Remainder directly upon an Eſtate for Life; and ſo it would alſo in Contingency if that were to happen during the continuance of the particular Eſtate: But I take this to be a ſtep further than any of our Reſolutions in Law have gone yet, and therefore I cannot ſee reaſon to extend the Expoſition any further; but am of opinion it fails in point of Limitation, and ought to be decreed for the Defendant.

The

The Lord Chief Juſtice Pemberton's *Opinion.*

I Need not trouble your Lordſhip with opening the Caſe, the truth is, it is in ſhort no more than thus: My Lord Duke of *Norfolk*'s Father, the Earl of *Arundel*, having created an Eſtate for 200 years, and ſetled the Inheritance by one Deed Intail to himſelf for life; and after to his Lady for life; and then to his Son and the Heirs Males of his body; and for default of ſuch Iſſue, to the other Son *Charles*, and the Heirs Males of his body, with ſeveral Remainders over. Then by another Deed, he does declare the Truſts of this term of 200 years, which being to *Henry* and the Heirs Males of his body, till my Lord *Maltravers* die without Iſſue Male, and the Earldom deſcend to my now Lord Duke; and after the determination of that Eſtate, if he ſhall die without Iſſue Male, then to come to *Charles* and the Heirs Males of his body, whether this be a good Remainder to *Charles* is the Queſtion. For as to any thing of the Recovery or the Aſſignment, I ſhall put it quite out of the Caſe, and do not think it will have any influence upon the Caſe as it lies before us. And indeed I do firſt think that the Earl of *Arundel* did certainly deſign, that if my Lord *Maltravers* ſhould die without Iſſue Male, whereby the Honour of the Family ſhould come to my Lord Duke that now is, *Charles* ſhould have this Eſtate; and his intentions are manifeſt by creating this Term, which could be of no other uſe but to carry over this Eſtate to *Charles* a younger Son, upon the elder Sons dying without Iſſue. And I do think truly that this was but a reaſonable Intention of the Father; for there being to come with the Earldom a great Eſtate that would ſo well ſupport it, it was reaſon, and the younger Sons might expect it, that their Fortunes might be ſomewhat advanced by their Father in caſe it ſhould ſo happen. It was a reaſonable expectation in them; and truly I think it was the plain intention of the Earl. And there is no great queſtion but it might have been made good and effectual by the limitation of two Terms; For if one Term had been limited to determine upon the death of *Thomas* without Iſſue, and that to be for the now Duke of *Norfolk*, and another Term then to commence and go over to *Charles*, that would certainly have been

been good, and carried the Eſtate to *Charles* upon that Contingency; but as this Caſe now is, I do think that this way that is now taken is not a good nor a right way; for I take this Limitation to *Charles* to be void in Law. And as to that, I know there is a famous difference of limiting Terms that are in Groſs, and Terms that attend the Inheritance. As to Terms that are in Groſs, I think it will be granted (becauſe it hath been ſetled ſo often) they are not capable of limitation to one after the death of one without Iſſue; for ſo are all the Caſes that have been cited. I think further, it is as clear, that upon Terms attendant upon an Inheritance, there may be ſuch a Limitation, to wit, that a Term that waits upon an Inheritance after the death of one without Iſſue, may go over to another: But then it is capable of ſuch a Limitation in that Caſe, with this reſtriction; that is, if the Inheritance be ſo limited; for though it be attendant ever ſo much upon the Inheritance, yet that attendance cannot make it capable of another Limitation than that Inheritance is capable of: For if I have an Eſtate in Fee-ſimple, and have the Truſt of a term attendant upon that, and I will let the Eſtate of Inheritance deſcend to my Son, I cannot in this caſe (though the Term be attendant) limit it, that if my Son die without Iſſue, that Term ſhall go over; it is not capable of any Forreign Limitation whatſoever; for as to that, it is a Term in Groſs, it hath not the quality of a Term attendant upon the Inheritance at all; for firſt, it would fail of an Inheritance, and a Free-hold to ſupport it, and further than a Term can be ſupported with a like Eſtate of Inheritance; It will fail to be a Term attendant upon the Inheritance. Now here the Eſtate of Inheritance is limited to *Henry* and the Heirs Males of his body, with Remainders to *Charles* and the Heirs Males of his body. Now thus the Term is capable of a Limitation to *Henry* and the Heirs Males of his body. And for want of ſuch Iſſue, to *Charles* and the Heirs Males of his body, becauſe it hath an Inheritance, on which it depends, to go along with it and ſupport it. But to take this out of its right Courſe and Channel, and put another Limitation upon it: That upon the dying of *Thomas* without Iſſue, whereby the Earldom ſhall deſcend, this ſhall go over to *Charles*; alas it cannot be, becauſe it hath no Free-hold or Inheritance to ſupport it.

And then beſides, it could not have that reaſon that the Law intends for its permitting ſuch Limitations to Terms attending

tending the Inheritance ; for I take it, the reaſon why Terms are admitted to be attendant upon the Inheritance , and to be capable of Limitations to go along with the Inheritance, is their relation they have to the Inheritance ; and becauſe it is for the benefit of the Inheritance, and that I conceive was the onely reaſon that at firſt guided theſe Judgements of the Court of Chancery , that theſe Terms ſhould be admitted to wait upon the Inheritance to protect it when Mortgages were made in former times by Feoffments, upon condition of payment of money, we hear of none of theſe Terms. But in the latter part of Queen *Elizabeth*'s time , and ſince, the way of limiting Terms in Mortgages came up in uſe , and then upon the buying of Inheritances came in the Truſt of theſe terms ; and they that purchaſed were adviſed to keep thoſe Terms on foot, to protect their purchaſed Inheritance.

I muſt look upon this indeed as a new Caſe of Novel invention ; for in truth I think, in truth, it is *Prima Impreſſionis*, and none of the former Caſes have been exactly the ſame : For this Term here does partake ſomewhat of a Term in Groſs, and ſomewhat of a Term attendant upon an Inheritance ; and if there ſhould be ſuch a Limitation admitted, ſuch a forreign Limitation as this is, (I call it Forreign, becauſe it is not that which goes along with the Inheritance.) If that be allowed , we know not what inventions may grow upon this ; for I know mens Brains are fruitful in inventions , as we may ſee in *Matthew Manning*'s Caſe. It was not foreſeen nor thought when that Judgement was given, what would be the Conſequence when once there was an Allowance of the Limitation of a Term after the death of a perſon, preſently it was diſcerned, there was the ſame reaſon, for after twenty mens lives as after one ; and ſo then it was held and agreed, that ſo long as the Limitation exceeded not Lives in being, at the creation of the Eſtate, it ſhould extend ſo far. That came to grow upon them then ; and now if this be admitted , no man can foreſee what an ill Effect ſuch an ill Allowance might have there , might ſuch Limitations come in as would incumber Eſtates and mightily entangle Lands.

This is certain, ſuch an allowed Limitation would adde a greater check to Eſtates, than ever was made by Limitations of Inheritance : For when an Eſtate of Inheritance was limited to a man and his Heirs Males of his body , with Remainders over , and a Term was limited accordingly to wait upon

upon the Inheritance. In that Caſe, he that had the firſt Eſtate-tail, had full power over the Term, to alienate it if he pleaſed; for it is not an Eſtate within the Statute *De Donis*, and I doubt not that had a great Influence upon the Judges, when they made the difference between Terms for years in Groſs, and Terms attendant upon the Inheritance. For Terms in Groſs, they could not be aliened in ſuch a Caſe; but Terms attending upon the Inheritance, though under ſuch Limitations, the parties could alien them.

But now if this Limitation in queſtion were good, then *Henry* could not part with it, becauſe it is to him and his Heirs Males of his body, under a collateral Limitation of his brothers dying without Iſſue, and the Earldom deſcending to himſelf, and then his Eſtate was to determine, and ſo it would fetter that which if it had been a Term attendant, *&c.* would have been alienable.

I have ſeen the time often when they have refuſed to carry Caſes further than the Precedents have been in former times; and peradventure it would be dangerous if we ſhould do ſo here; and it ſeems to me to be an odd kind of Eſtate, as this Limitation makes it; and if ſuch a conſtruction as the Plaintiff would have ſhould be made, it would bring it under a great uncertainty. To take this Eſtate as it ſtands in *Henry* and the Heirs Males of his body, it is by this Limitation made, and ſo indeed, I think it is a Term that waits upon the Inheritance: But if this that is contended for be admitted to be a good Limitation upon the Contingency of *Thomas*'s dying without Iſſue Male, then the Eſtate in *Charles* would be a Term in Groſs, for it hath no Inheritance to attend upon. Then ſuppoſe *Henry* had died without Iſſue Male in *Charles*'s life-time, then it is a Term attendant upon the Inheritance again. If *Charles* die in the life of *Henry*, it goeth to the Executors. If *Henry* in the life of *Charles*, it goes to the Heirs.

Therefore I think that this Eſtate being limited in another way, and being it would endure a ſtrain further than any yet has been attempted, and it being to commence upon *Thomas*'s dying without Iſſue Male, and not attendant upon any Inheritance, it is ſuch an Eſtate as the Law cannot allow of, but void in Limitation and Creation; and ſo I take it the Plaintiffs Bill ought to be diſmiſſed.

The

THE Lord Chancellor *NOTTINGHAM'S* ARGUMENTS.

The First Argument.

THIS is the Caſe. The Plaintiff, by his Bill demands the benefit of a Term for two hundred Years, in the Barony of *Greyſtocke*, upon theſe ſettlements.

Henry Fredericke late Earl of *Arundel* and *Surry*, Father of the Plaintiff and Defendant, had Iſſue, *Thomas*, *Henry*, *Charles*, *Edward*, *Francis* and *Bernard*; and a Daughter, the Lady *Katharine*: *Thomas* Lord *Maltravers*, his eldeſt Son was *Non compos Mentis*, and care is taken to ſettle the Eſtate and Family, as well as the preſent circumſtances will admit. And thereupon there are two Indentures drawn, and they are both of the ſame date. The one is an Indenture between the Earl of *Arundel* of the one part; and the Duke of *Richmond*, the Marqueſs of *Dorcheſter*, *Edward* Lord *Howard* of *Eaſtcricke*, and Sir *Thomas Hatton*, of the other part: it bears date the Twenty firſt day of *March*, 1647. Whereby an Eſtate is conveyed to them and their Heirs; To theſe uſes; To the uſe of the Earl for his life.

After that to the Counteſs his Wife for her life, with power to make a Leaſe for 21. Years, reſerving the antient Rents.

The remainder for 200. Years to thoſe Truſtees, and that upon ſuch truſts, as by another Indenture intended to bear date the ſame day the Earl ſhould limit and declare; and then the remainder of the Lands are to the uſe of *Henry*, and the Heirs Males of his Body begotten, with like remainders in Tail to *Charles*, *Edward*, and the other Brothers ſucceſſively.

Then comes the other Indenture, which was to declare the Truſt of the Term for 200 Years, for which all theſe preparations are made, and that declares that it was intended this

Term ſhould attend the Inheritance, and that the profits of the ſaid Barony, &c. ſhould be received by the ſaid *Henry Howard*, and the Heirs Males of his Body ſo long as *Thomas* and any Iſſue Male of his Body ſhould live, (which was conſequently only during his own life, becauſe he was never likely to Marry) and if he dye without Iſſue in the life-time of *Henry*, not leaving a Wife *privement Enſeint* of a Son, or if after his death, the Dignity of *Earl* of *Arundel* ſhould deſcend upon *Henry*; Then *Henry* or his Iſſue ſhould have no farther benefit or profit of the Term of 200 Years. Who then ſhall? But the benefit ſhall redound to the younger Brothers in manner following. How is that? To *Charles* and the Heirs Males of his Body, with the like Remainders in Tail to the reſt. Thus is the matter ſettled by theſe Indentures; how this Family was to be provided for, and the whole Eſtate govern'd for the time to come.

Theſe Indentures are both ſealed and delivered in the preſence of Sir *Orlando Bridgman*, Mr. *Edward Alehorn* and *Mr. John Alehorn*, both of them my Lord Keeper *Bridgman*'s Clerks; I knew them to be ſo.

This Atteſtation of theſe Deeds is a Demonſtration to me they were drawn by Sir *Orlando Bridgman*.

After this the Contingency does happen: for *Thomas Duke* of *Norfolk* dies without Iſſue, and the Earldom of *Arundel* as well as the Dukedom of *Norfolk* deſcended to *Henry* now *Duke* of *Norfolk*, by *Thomas* his death without Iſſue: preſently upon this the Marqueſs of *Dorcheſter*, the ſurviving Truſtee of this Eſtate, aſſigns his Eſtate to *Marryot*, but he doth it upon the ſame Truſts that he had it himſelf: Mr. *Marryot* aſſigns his intereſt frankly to my Lord *Henry*, the now *Duke*, and ſo has done what he can to merge and extinguiſh the Term by the ſigning it to him, who has the Inheritance.

To excuſe the Marqueſs of *Dorcheſter* from cooperating in this matter, it is ſaid, there was an abſolute neceſſity ſo to do; Becauſe the Tenants in the *North* would not be brought to renew their Eſtates, while ſo Aged a perſon did continue in the Seigniory, for fear, if he ſhould dye quickly, they ſhould be compelled to pay a new Fine. But nothing in the World can excuſe *Marryot* from being guilty of a moſt wilful and palpable Breach of Truſt, if *Charles* have any Right to this Term: ſo that the whole contention in the Caſe is to make the Eſtate limited to *Charles*, void, void in the Original Creation, if not ſo, void by the common Recovery ſuffered by the now *Duke*, and the Aſſignment of *Marryot*. If the Eſtate be Originally void,

which

which is limited to *Charles*, there is no harm done; but if it only be avoided by the Aſſignment of *Marryot*, with the concurrence of the *Duke* of *Norfolk*, he having notice of the Truſts, then moſt certainly they muſt make it good to *Charles* in Equity, for a palpable Breach of Truſt of which they had notice. So that the queſtion is reduced to this main ſingle point, Whether all this care that was taken to ſettle this Eſtate and Family, be void and inſignificant; and all this proviſion made for *Charles* and the Younger Children to have no Effect.

I am in a very great ſtrait in this Caſe: I am aſſiſted by as good advice, as I know how to repoſe my ſelf upon, and I have the faireſt opportunity, if I concur with them, and ſo ſhould miſtake to excuſe my ſelf, that I did *errare cum patribus*; but I dare not at any time deliver any Opinion in this place, without I concur with my ſelf and my Conſcience too.

I deſire to be heard in this Caſe with great benignity, and with great excuſe for what I ſay, for I take this queſtion to be of ſo *univerſal a Concernment* to all Mens Rites and Properties, in point of diſpoſing of their Eſtates, as to moſt conveyances, made and ſettled in the late times and yet on foot, that being afraid I might ſhake more ſettlements than I am willing to do, I am not diſpoſed to keep ſo cloſely and ſtrictly to the Rules of Law as the Judges of the Common-Law do, as not to look to the Reaſons and Conſequences that may follow upon the determination of this Caſe.

I cannot ſay in this Caſe, that this Limitation is void, and becauſe this is a point, that in Courts of Equity (which are not favoured by the Judgments of the Courts of Law) is ſeldom debated with any great Induſtry at the Bar; but where they are poſſeſſed once of the Cauſe, they preſs for a Decree, according to the uſual and known Rules of Law; and think we are not to examine things. And becauſe it is probable this Cauſe, be it adjudged one way or other, may come into the Parliament, I will take a little pains to open the Caſe, the Conſequences that depend upon it, and the Reaſons that lye upon me, as thus perſwaded, to ſuſpend my Opinion.

Whether this Limitation to *Charles* be void or no, is the Queſton. Now, firſt, theſe things are plain and clear, and by taking notice of what is plain and clear, we ſhall come to ſee what is doubtful.

1. That the Term in Queſtion, tho' it were attendant upon the Inheritance, at firſt, yet upon the hapning of the Contingency, it is become a Term in groſs to *Charles*.

2. That

2. That the Truſt of a Term in groſs can be limited no otherwiſe in Equity, than the Eſtate of a Term in groſs can be limited in Law: for I am not ſetting up a Rule of Property in Chancery, other than that which is the Rule of Property at Law.

3. It is clear, That the legal Eſtate of a Term for Years, whether it be a long or a ſhort Term, cannot be limited to any Man in Tail, with the remainder over to another after his death without Iſſue; That is flat and plain, for that is a direct perpetuity.

4. If a Term be limited to a Man and his Iſſue, and if that Iſſue dye without Iſſue, the remainder over, the Iſſue of that Iſſue takes no Eſtate; and yet becauſe the remainder over cannot take place, till the Iſſue of that Iſſue fail, that remainder is void too, which was *Reeves* Caſe; and the reaſon is, becauſe that looks towards a perpetuity.

5. If a Term be limited to a Man for life, and after to his firſt, ſecond, third, *&c.* and other Sons in Tail ſucceſſively, and for default of ſuch Iſſue the remainder over, tho' the contingency never happen, yet that Remainder is void, tho' there were never a Son then born to him; for that looks like a perpetuity, and this was Sir *William Backhurſt* his Caſe in the 16. of this King.

Modern Reports, 115.

6. Yet one ſtep further than this, and that is *Burgis*'s Caſe. A Term is limited to one for life, with contingent Remainders to his Sons in Tail, with remainder over to his Daughter, tho' he had no Son; yet becauſe it was foreign and diſtant to expect a Remainder after the Death of a Son to be born without Iſſue, that having a proſpect of a perpetuity, alſo was adjudged to be void.

Modern Reports, 115.

Theſe things having been ſettled, and by theſe Rules has this Court always governed it ſelf: But one ſtep more there is in this Caſe.

7. If a Term be deviſed, or the Truſt of a Term limited to one for Life, with twenty Remainders for Life, ſucceſſively, and all the perſons in *eſſe*, and alive at the time of the Limitation of their Eſtates, theſe tho' they look like a poſſibility upon a poſſibility, are all good, becauſe they produce no inconvenience, they were out in a little time with an eaſie interpretation, and ſo was *Alford*'s Caſe. I will yet go farther.

Roll. abr. tit. deviſe, 612.

8. In the Caſe cited by Mr. *Holt*, *Cotton* and *Heath*'s Caſe, a Term is deviſed to one for 18. Years, after to *C.* his eldeſt Son for Life, and then to the eldeſt Iſſue Male of *C.* for Life, tho' *C.* had not any Iſſue Male at the time of the Deviſe, or death

death of the Deviſor, but before the death of *C.* it was reſolved by Mr. Juſtice *Jones*, Mr. Juſtice *Crook*, and Mr. Juſtice *Berkley*, to whom it was referred by the Lord Keeper *Coventry*, that it only being a contingency upon a Life that would be ſpeedily worn out, it was very good; for that there may be a poſſibility upon a poſſibility, and that there may be a contingency upon a contingency, is neither unnatural nor abſurd in it ſelf; but the contrary Rule given as a Reaſon by my Lord *Popham* in the Rector of *Chedington's* Caſe, looks like a Reaſon of Art; but, in truth, has no kind of Reaſon in it, and I have known that Rule often denied in *Weſtminſter-Hall*. In truth, every Executory Deviſe is ſo, and you will find that Rule not to be allowed in *Blanford* and *Blanford's* Caſe, 13. *Jac.* 1. part of my Lord *Rolls*, 318. where he ſays, If that Rule take place, it will ſhake ſeveral common Aſſurances: And he cites *Paramour's* and *Yardley's* Caſe in the Commentaries where it was adjudged a good Deviſe, though it were a poſſibility upon a poſſibility. *Co.* 1. 156.

Theſe Concluſions, which I have thus laid down, are but Preliminaries to the main Debate. It is now fit we ſhould come to ſpeak to the main Queſtion of the Caſe, as it ſtands upon its own Reaſon, diſtinguiſhed from the Reaſons of theſe Preliminary; and ſo the Caſe is this.

The Truſt of a Term for Two Hundred Years is limited to *Henry* in Tail, provided if *Thomas* die without Iſſue in the life of *Henry*, ſo that the Earldom ſhall deſcend upon *Henry*, then to go to *Charles* in Tail; and whether this be a good Limitation to *Charles* in Tail, is the Queſtion; for moſt certainly it is a void Limitation to *Edward* in Tail, and a void Limitation to the other Brothers in Tail: But whether it be good to *Charles* is the doubt, who is the firſt taker of this Term in groſs; for ſo it is (I take it) now become, and I do under favour, differ from my Lord Chief Juſtice in that point; for, if *Charles* die, it will not return to *Henry*; for that is my Lord *Cook's* error in *Leonard Loveis's* Caſe: for he ſays, That if a Term be deviſed to one and the Heirs Males of his Body, it ſhall go to him or his Executors, no longer than he has Heirs Males of his Body; but it was reſolved otherwiſe in *Leventhorp's* and *Aſhby's* Caſe, 11. *Car. B. R.* Rolls Abridgment, Title Deviſe, fol. 611. for theſe Words are not the Limitation of the time, but an abſolute diſpoſition of the Term. *Co.* 10. 87.

But now let us, I ſay, conſider whether this Limitation be good to *Charles* or no. It hath been ſaid,

Obj. 1. It is not good by any means; for it is a poſſibility upon a poſſibility.

Anſw. That is a weak Reaſon, and there is nothing of Argument in it, for there never was yet any Deviſe of a Term with Remainder over, but did amount to a poſſibility upon a poſſibility, and executory Remainders will make it ſo.

Obj. 2. Another thing was ſaid, it is void, becauſe it doth not determine the whole Eſtate, and ſo they compare it to Sir *Anthony Mildmay*'s Caſe, where it is laid down as a Rule, that every Limitation or Condition ought to defeat the intire Eſtate, and not to defeat part, and leave part not defeated; and it cannot make an Eſtate to ceaſe as to one perſon, and not as to the other. But,

Anſw. I do not think, that any Caſe or Rule was ever worſe applied than that to this; for if you do obſerve this Caſe, here is no *Proviſo* at all annexed to the legal Eſtate of the Term, but to the equitable Eſtate, that is built upon the legal Eſtate unto the Eſtate to *Henry*, and the Heirs Males of his Body, to attend the Inheritance with a *Proviſo*, If *Thomas* die without Iſſue in *Henry*'s life, and the Earldom come to *Henry*, then to *Charles*: which doth determine the Eſtate to *Henry* and his Iſſue; but the other Eſtate given to *Charles* doth ariſe upon this *Proviſo*, which makes it an abſurdity to ſay, that the ſame *Proviſo*, upon which the Eſtate ariſeth, ſhould determine that Eſtate too.

Obj. 3. The graet matter objected is, It is againſt all the Rules of Law, and tends to a perpetuity.

Anſw. If it tends to a perpetuity, there needs no more to be ſaid, for the Law has ſo long laboured againſt perpetuities, that it is an undeniable Reaſon againſt any ſettlement, if it can be found to tend to a perpetuity.

Therefore let us examine whether it do ſo, and let us ſee what a Perpetuity is, and whether any Rule of Law is broken in this Caſe.

A perpetuity is the ſettlement of an Eſtate or an Intereſt in Tail, with ſuch Remainders Expectant upon it, as are in no ſort in the power of the Tenant in Tail in poſſeſſion, to dock by any Recovery or Aſſignment, but ſuch Remainders muſt continue as perpetual clogs upon the Eſtate: ſuch do fight againſt God, for they pretend to ſuch a ſtability in human Affairs, as the nature of them admits not of, and they are againſt the Reaſon and the policy of the Law, and therefore not to be endured.

But

But on the other ſide, future Intereſts, ſpringing Truſts, or Truſts Executory, remainders that are to emerge and ariſe upon Contingencies, are quite out of the Rules and Reaſons of Perpetuities, nay, out of the reaſon upon which the Policy of the Law is founded in thoſe Caſes, eſpecially, if they be not of remote or long conſideration; but ſuch as by a natural and eaſie interpretation will ſpeedily wear out, and ſo things come to their right Channel again.

Let us examine this Rule with reſpect to Freehold-Eſtates, and ſee whether there it will amount to the ſame Iſſue.

There is not in the Law a clearer Rule than this, that there can be no Remainders limitted after a Fee ſimple, ſo is the expreſs Book: Caſe 19 *Hen.* 8. in my Lord *Dyer*; but yet the nature of things, and the neceſſity of commerce between Man and Man, have found a way to paſs by that Rule, and that is thus; either by way of Uſe, or by way of Deviſe: Therefore if a Deviſe be to a Man and his Heirs, and if he dye without Iſſue in the life of *B.* then to *B.* and his Heirs: this is a Fee ſimple upon a Fee ſimple, and yet it has been held to be Good.

My Lord Chief Baron did ſeem to think, that this Reſolution did take its Original from *Pells* and *Brown*'s Caſe; but it did not ſo, the Law was ſetled before; you may find it expreſly reſolved 19 *Eliz.* in a Caſe between *Hinde* and *Lyon*, 3. *Leonard.* Which, of the Books that have lately come out, is one of the beſt; and it was there adjudged to be ſo good a limitation, that the Heir who pleaded *riens peer deſcent* was forced to pay the Debt, and it had the concurrence of a judgment in 38 *Eliz.* grounded upon the Reaſon of *Wellock* and *Hammond*'s Caſe cited in *Beraſton*'s Caſe, where it is ſaid, *Crooke, Eliz.* 204. in a deviſe it may well be, that an Eſtate in Fee ſhall ceaſe in one, and be transferred to another: all this was before *Pells* and *Brown*'s Caſe, which was in 18 *Jac.* It is true, it was made a Queſtion afterwards in the Serjeants Caſe; but what then? We all know that to be no Rule to judge by; for what is uſed to exerciſe the Wits of the Serjeants, is not a governing Opinion to decide the Law. It was alſo adjudged in *Hil.* 1649. when my Lord *Rolls* was Chief Juſtice, and again in *Mich.* 1650. and after that indeed in 1651. it was reſolved otherwiſe in *Jay* and *Jay*'s Caſe: but it has been often agreed that where it is within the compaſs of one Life, that the Contingency is to happen, there is no danger of a perpetuity. And I oppoſe it to that Rule which was taken by one of the Lords the Judges, That where no Remainders can be limi-

Cro. Mich. 18 *Jac.* 590

3 *Leonard.* 64.

limited, no contingent Remainder can be limited, which I utterly deny, for there can be no Remainder limited after a Fee ſimple, yet there may a contingent Fee ſimple ariſe out of the firſt Fee, as hath been ſhewn.

Thus it is agreed to be by all ſides in the Caſe of an Inheritance; but now ſay they, a Leaſe for Years, which is a Chattel, will not bear a contingent Limitation in regard of the poverty and meanneſs of a Chattel Eſtate. Now as to this point, the difference between a Chattel and an Inheritance is a difference only in Words, but not in ſubſtance, nor in Reaſon, or the Nature of the thing: for the owner of a Leaſe has as abſolute a power over his Leaſe, as he that hath an Inheritance has over that. And therefore where no perpetuity is introduced, nor any inconveniency doth appear, there no Rule of Law is broken.

The Reaſons that do ſupport the ſpringing Truſt of a Term as well as the ſpringing uſe of an Inheritance, are theſe.

1. Becauſe it hath hapned ſometimes, and doth frequently, that Men have no Eſtates at all, but what conſiſt in Leaſes for Years: Now it were not only very ſevere, but (under favour) very abſurd, to ſay that he who has no other Eſtate but what conſiſts in Leaſes for Years, ſhall be incapable to provide for the Contingencies of his own Family, tho' theſe are directly within his view and immediate proſpect. And yet if that be the Rule, ſo it muſt be; for I will put the Caſe; A Man that hath no other Eſtate but Leaſes for Years, Chattels real, treats for the Marriage of his Son, and thereupon it comes to this agreement: Theſe Leaſes ſhall be ſetled as a Joynture for the Wife, and proviſion for the Children: ſays he, I am content, but how ſhall it be done? Why thus; You ſhall aſſign all theſe Terms to *John* a *Styles*, in Truſt for your ſelf and your Executors, if the marriage take no effect; But then, if it takes effect, to your Son while he lives, to his Wife after while ſhe lives, with Remainders over. I would have any one tell me whether this were a void limitation upon a Marriage ſettlement; or if it be, what a ſtrange abſurdity is it, that a Man ſhall ſettle it if the Marriage take no effect, and ſhall not ſettle it if the Marriage happen:

2. Suppoſe the Eſtate had been limited to *Henry Howard* and the Heirs Males of his Body, till the death of *Thomas* without Iſſue, then to *Charles*, there it had been a void limitation to *Charles*: if then the addition of thoſe words, *If Thomas dye without Iſſue in the life of Henry, &c.* have not mended the matter,

ter, then all that addition of Words goes for nothing, which it is unreaſonable and abſurd to think it ſhould.

3. Another thing there is, which I take to be unanſwerable, and I gather it from what fell from my Lord Chief Juſtice *Pemberton*; and when I can anſwer that Caſe, I ſhall be able to anſwer my ſelf very much for that which I am doing. Suppoſe the Proviſoe had been thus penned, And if *Thomas* die without Iſſue Male, living *Henry*, ſo that the Earldom of *Arundel* deſcend upon *Henry*, then the Term of 200 Years limited to him and his Iſſue, ſhall utterly ceaſe and determine, but then a new Term of 200 Years ſhall ariſe and be limited to the ſame Truſtees, for the Benefit of *Charles* in Tail. This he thinks might have been well enough, and attained the end and intention of the Family, becauſe then this would not be a Remainder in Tail upon a Tail, but a new Term created.

Pray let us ſo reſolve Caſes here, that they may ſtand with the reaſon of Mankind, when they are debated abroad. Shall that be reaſon here that is not reaſon in any part of the World beſides? I would fain know the difference, why I may not raiſe a new ſpringing Truſt upon the ſame Term, as well as a new ſpringing Term upon the ſame Truſt; that is ſuch a chicanery of Law as will be laught at all over the Chriſtian World.

4. Another Reaſon I go on is this; That the meanneſs of the conſideration of a Term for years, and of a Chattel Intereſt, is not to be regarded: for whereas this will be no reaſon any where elſe; ſo I ſhall ſhew you, that this Reaſon, as to the Remainder of a Chattel Intereſt, is a Reaſon that has been exploded out of *Weſtminſter-Hall*. There was a time indeed that this Reaſon did ſo far prevail, that all the Judges in the time of my Lord Chancellor *Rich*, did 6 *Edvardi* 6 deliver their Opinions, That if a Term for Years be deviſed to one, provided, that if the Deviſee die, living *J. S.* then to go to *J. S.* that remainder to *J. S.* is abſolutely void, becauſe ſuch a Chattel Intereſt of a Term for Years is leſs than a Term for Life, and the Law will endure no limitation over. Now this being a Reaſon againſt Senſe and Nature, the World was not long governed by it, but in 10 *Eliz.* in *Dyer*, they began to hold the Remainder was good by Deviſee; and ſo 15 *Eliz.* ſeems too, and 19 *Eliz.* it was by the Judges held to be a good Remainder; and that was the firſt time that an executory Remainder of a Term was held to be good. When the *Chancery* did begin to ſee that the Judges of the Law did govern themſelves by the reaſon of the thing, this Court followed their Opinion, the better to fix them in it, they allowed of Bills by the remain-

Dyer, fol. 74.

Dyer, f. 277.

Dyer, f. 328.
Dyer, f. 358.

der Man, to compel the Deviſee of the particular Eſtate, to put in ſecurity that he in Remainder ſhould enjoy it according to the Limitation. And for a great while ſo the practice ſtood, as they thought it might well, becauſe of the Reſolution of the Judges, as we have ſhewn: but after this was ſeen to multiply the *Chancery* Suits, then they began to reſolve that there was no need of that way, but the executory Remainder Man ſhould enjoy it, and the Deviſee of the particular Eſtate ſhould have no power to bar it. Men began to preſume upon the Judges then, and thought if it were good as to Remainders after Eſtates for Lives, it would be good alſo as to Remainders upon Eſtates Tail: That the Judges would not endure, and that is ſo fixed a Reſolution, that no Court of Law or Equity ever attempted to break in the World. Now then come we to this Caſe, and if ſo be where it does not tend to a perpetuity, a Chattel Intereſt will bear a Remainder over, upon the ſame Reaſon it will bear a Remainder over upon a Contingency, where that Contingency doth wear out within the compaſs of a life, otherwiſe, it is only to ſay, it ſhall not, becauſe it ſhall not: For there is no more inconvenience in the one than in the other.

Come we then at laſt, to that which ſeems moſt to choak the Plaintiffs Title to this Term, and that is the reſolution in *Child* and *Baylie*'s Caſe: For it is upon that Judgment, it ſeems, all Conveyances muſt ſtand or be ſhaken, and our Decrees made. Now therefore I will take the liberty to ſee what that Caſe is, and how far the Opinion of it ought to prevail in our Caſe.

1. If *Child* and *Baylie*'s Caſe be no more than as it is reported by *Rolls*, part. 2. fol. 129. then it is nothing to the purpoſe: A Deviſe of a Term to *Dorothy* for life, the remainder to *William*, and if he dies without Iſſue, to *Thomas*, without ſaying, in the life of *Thomas*; and ſo it is within the common Rule of a Limitation of a Term in Tail, with Remainder over, which cannot be good.

But if it be as Juſtice *Jones* has reported it, *fol.* 15, then it is as far as it can go, an Authority: For it is there ſaid to be, living *Thomas*. But the Caſe, under favour, is not altogether as Mr. Juſtice *Jones* hath reported it neither; for I have ſeen a Copy of the Record upon this account; and, by the way, no Book of Law is ſo ill corrected, or ſo ill printed as that.

The true Caſe is, as it is reported by Mr. Juſtice *Crook*; and with Mr. Juſtice *Crooks* Report of it, doth my Lord *Rolls* agree, in his abridgment, Title Deviſe, 612. There it is, a Term of

Cro. Hil. 15. *Jac.* 459.

76.

76 Years is deviſed to *Dorothy* for life, then to *William* and his Aſſigns all the reſt of the Term, provided if *William* die without Iſſue then living, then to *Thomas*; and this is in effect our preſent Caſe; I agree it. But that which I have to ſay to this Caſe is.

Firſt, It muſt be obſerved, that the Reſolution there, did go upon ſeveral Reaſons, which are not to be found in this Caſe.

1. One Reaſon was touched upon by my Lord Chief Baron, That *William* having the Term, to him and his Aſſigns, there could be no Remainder over to *Thomas*, of which Words there is no notice taken by Mr. Juſtice *Jones*.

2. *Dorothy* the Deviſee for life, was Executrix, and did aſſent and grant the Leaſe to *William*, both which Reaſons my Lord *Rolls* doth lay hold upon, as material, to govern the Caſe.

3. *William* might have aſſigned his Intereſt, and then no Remainder could take place, for the Term was gone.

4. He might have had Iſſue, and that Iſſue might have aſſigned, and then it had put all out of doubt.

5. But the main Reaſon of all, which makes me oppoſe it, ariſeth out of the Record, and is not taken notice of in either of the Reports of *Rolls*, or *Jones*, or in *Rolls* Abridgment. The Record of that Caſe goes farther, for the Record ſayes; *There was a farther Limitation upon the death of* Thomas *without Iſſue to go to the Daughter, which was a plain affectation of a perpetuity to multiply Contingencies*. It farther appears by the Record, that the Fathers Will was made the 10 of *Eliz.* *Dorothy* the Deviſee for life, held it to the 24, and then ſhe granted and aſſigned the Term to *William*, he under that Grant held it till the 31 of *Eliz.* and then regranted it to his Mother, and dyed; the Mother held it till the 1 of K. *James*, and then ſhe dyed; the Aſſignees of the Mother held it till 14 *Jac.* and then and not till then did *Thomas*, the younger Son, ſet up a Title to that Eſtate; and before that time it appears by the Record, there had been ſix ſeveral Alienations of the Term to Purchaſers, for a valuable Conſideration, and the Term renewed for a valuable Fine paid to the Lord. And do we wonder now, that after ſo long an acquieſcence as from 10 *Eliz.* to 14 *Jacob*, and after ſuch ſucceſſive Aſſignments and Tranſactions, that the Judges began to lye hard upon *Thomas*, as to his Intereſt in Law, in the Term, eſpecially when the Reaſons given in the Reports of the Caſe, were legal Inducements to guide their Judgments, of which there are none in our Caſe? But then,

Secondly, At laſt, allowing this Caſe to be as full and direct an Authority as is poſſible, and as they would wiſh, that rely upon it; then I ſay ----

1. The

1. The Reſolution in *Child* and *Balie's* Caſe, is a Reſolution that never had any Reſolution like it before nor ſince.

2. It is a Reſolution contradicted by ſome Reſolutions, and to ſhew, that that Reſolution has been contradicted, there is---

1. The Caſe of *Cotton* and *Heath*, which looks very like a contrary Reſolution, there is a Term limited to *A.* for eighteen years, the Remainder to *B.* for life, the Remainder to the firſt Iſſue of *B.* for life, this Contingent upon a Contingent was allowed to be good, becauſe it would wear out in a ſhort time. But

2. To come up more fully and cloſely to it, and to ſhew you, that I am bound up by the Reſolutions of this Court, there was a fuller and flatter Caſe 21 *Car.* 2. in *July* 1669, between *Wood* and *Saunders*. The Truſt of a long Leaſe is limited and declared thus: To the Father for ſixty years, if he lived ſo long; then to the Mother for ſixty years, if ſhe lived ſo long; then to *John* and his Executors if he ſurvived his Father and Mother; and if he died in their life-time, having Iſſue, then to his Iſſue; but if he dye without Iſſue, living the Father or Mother, then the Remainder to *Edward* in Tail. *John* did die without Iſſue, in the life-time of the Father and Mother, and the queſtion was, whether *Edward* ſhould take this Remainder after their death, and it was Reſolved by my Lord Keeper *Bridgeman*, being aſſiſted by Judge *Twiſden* and Judge *Rainsford*, that the Remainder to *Edward* was good, for the whole Term had veſted in *John*, if he had ſurvived; Yet the Contingency never hapning, and ſo wearing out in the compaſs of two Lives in being, the Remainder over to *Edward* might well be limited upon it.

Thus we ſee, that the ſame Opinion which Sir *Orlando Bridgeman* held when he was a Practizer, and drew theſe Conveyances upon which the queſtion now ariſeth, remained with him when he was the Judge in this Court, and kept the Seals; and by the way, I think it is due to the Memory of ſo great a Man, whenever we ſpeak of him, to mention him with great Reverence and Veneration for his Learning and Integrity.

Object. They will perhaps ſay, Where will you ſtop, if not at *Child* and *Balie's* Caſe?

Anſ. Where? why every where, where there is any Inconvenience, any danger of a perpetuity; and where-ever you ſtop at the limitation of a Fee upon a Fee, there we will ſtop in the limitation of a Term of years. No man ever yet ſaid, a Deviſe to a man and his Heirs, and if he die without Iſſue, living *B.* then to *B.* is a naughty Remainder, that is *Pells* and *Browns* Caſe

Now the *Ultimum quod ſit*, or the utmoſt limitation of a Fee upon

upon a Fee, is not yet plainly determined, but it will be ſoon found out, if men ſhall ſet their Wits on work to contrive by Contingencies, to do that which the Law has ſo long laboured againſt, the thing will make it ſelf Evident, where it is Inconvenient, and God forbid, but that Miſchief ſhould be obviated and prevented.

I have done with the legal Reaſons of the Caſe: it is fit for us here a little to obſerve the Equitable Reaſons of it; and I think this Deed is good both in Law and Equity; And the Equity in this Caſe is much ſtronger, and ought to ſway a man very much to incline to the making good this Settlement if he can. For,

1. It was prudence in the Earl to take care, that when the Honour deſcended upon *Henry*, a little better ſupport ſhould be given to *Charles*, who was the next Man, and trode upon the heels of the Inheritance.

2. Though it was always uncertain whether *Thomas* would die without Iſſue living *Henry*, yet it was morally certain that he would die without Iſſue, and ſo the Eſtate and Honour come to the younger Son: for it was with a careful circumſpection always provided, that he ſhould not Marry till he ſhould recover himſelf into ſuch eſtate of body and mind, as might ſuit with the honour and dignity of the Family.

3. It is a very hard thing for a Son to tell his Father, that the proviſion he has made for his younger Brothers is void in Law, but it is much harder for him to tell him ſo in Chancery. And if ſuch a proviſion be void, it had need be void with a vengance; it had need be ſo clearly void that it ought to be a prodigie if it be not ſubmitted to.

Now where there is no perpetuity introduced, no cloud hanging over the Eſtate but during a Life, which is a common poſſibility where there is no inconvenience in the Earth, and where the Authorities of this Court concur to make it good; to ſay all is void, and to ſay it here, I declare it, I know not how to do it. To run ſo Counter to the Judgment of that great man, my Lord Keeper *Bridgman*, who both adviſed this ſettlement; and when he was upon his Oath in this place decreed it good. I confeſs his Authority is too hard for me to reſiſt, though I am aſſiſted by ſuch learned and able Judges, and will pay as great a Deference to their Opinions as any man in the World ſhall.

If then this ſhall not be void, there is no need for the Merger by the Aſſignment or the Recovery to be conſidered in the Caſe: For if ſo be this be a good limitation of the Truſt, and they who had notice of it, will palpably break it, they are

bound by the Rules of Equity to make it good by making ſome Reparation. Nay, which is more, if the Heir enter upon the Eſtate to defeat the Truſt, that very Eſtate doth remain in Equity infected with the Truſt; which was the Caſe of my Lord of *Thomond*; ſo alſo was the Reſolution in *Jackſon* and *Jackſon's* Caſe: So that to me the Right appears clear, and the Remedy ſeems not to be difficult. Therefore my preſent thoughts are, that the Truſt of this Term was well limited to *Charles*, who ought to have the Truſt of the whole Term Decreed to him, and an account of the mean profits, for the time by paſt, and a recompence made to him from the *Duke* and *Marryot* for the time to come. But I do not pay ſo little Reverence to the Company I am in, as to run down their ſolemn Arguments and Opinions upon my preſent Sentiments; and therefore I do ſuſpend the Inrolment of any Decree in this Caſe, as yet: but I will give my ſelf ſome time to conſider, before I take any final Reſolution, ſeeing the Lords the Judges do differ from me in their Opinions.

De Termino Paſch. anno 34. Car. II. Ro. In Cancell. Sabbati 13 die Maij.

Howard Verſus Le Duc de Norfolk.

THis Day was appointed for final Judgment in this cauſe, and it being called.

Mr. *Serjeant M.* moved. My Lord we depend upon your Lordſhip in that cauſe for your Opinion.

Mr. *S. G.* My Lord, in the Caſe of *Howard* againſt the Duke of *Norfolk*, I do not know whether I may have the Liberty to move this that I am going to offer. It ſtands now in the Paper now for your Lordſhips Judgment, and therefore I ſpeak this, that I now offer with great ſubmiſſion, if your Lordſhip will pleaſe to hear it. If you will pleaſe to allow my Lord of *Arundel's* Counſel the liberty of offering any thing further in the Cauſe. Poſſibly it will not become them to offer any thing that hath been ſaid, but if they may be permitted to argue ſome new matter if they can find any. Therefore we that are for my Lord of *Arundel*, deſire the liberty of having ſome little time till Mr. *Keck* (who is of my Lords Coun-

Counſel, but at preſent indiſpoſed, and has not yet been heard) can come, which we hope will not be long. We hope it will be no prejudice to this Cauſe, which has had ſo long an agitation, to ſtay a few days longer. A Weeks time ſure will break no ſquares.

Lord Chancellor, I did appoint the firſt *Tueſday* in the Term to deliver my Opinion in this Caſe, for I deſire to rid my hands of it. But Mr. *Keck*, who was then at the Bar, did pray that he might argue it once more for the Defendant, and my Lord Duke of *Norfolk*, having never been heard by Mr. *Keck*, I was willing to hear him. For it was a Cauſe of moment and difference of Opinions, and there are ſo many Short-hand Writers, that nothing can paſs from us here, but it is preſently made publick, and tho' a Man doth not ſpeak in Print, yet what he ſays ſhall be immediately put in Print; therefore becauſe Mr. *Keck* deſired it, and to juſtify my own Opinion, tho' I had appointed the firſt *Tueſday* in the Term, yet I gave till this day. It is but reaſon Mr. *Keck* ſhould be heard, who has not yet argued it, and if any Man can convince me I am in an error, or make it appear to me, that I am miſtaken in the Law, in the Opinion I have given, which as yet I ſee no cauſe in the World to change, God forbid, but I ſhould hear them, but on the other ſide, this cauſe muſt not everlaſtingly be put off, becauſe my Lord Dukes Counſel are not here. Therefore I will give you a Weeks time further, but upon this Day ſevennight, come or not come, I will give my Judgment in the Cauſe.

Mr. *Serj. M.* If your Lordſhip pleaſes to put it upon the other ſide, unleſs they ſhew cauſe, then the Opinion your Lordſhip has given to ſtand.

Lord Chancellor, If my Opinion (which is under the prejudice of being contrary to that of the three Chief Judges) can be refuted, I am not aſhamed to retract any error I may be convinced of, but truly at preſent, I ſee no colour to retract it.

Mr. *Serj. M.* We pray then my Lord, that we may have this right done for us, who are for Mr. *Howard* the Plaintiff, that they on the other ſide, will let us know what particular points we muſt go upon, for if they come at large, we may not perhaps be ſo well provided to anſwer them.

Lord Chancellor, I ſuppoſe they can ſay nothing to any point, but that which is the main point in the Caſe the limitation of the remainder of a ſpringing Truſt after the Entail of a Term, that is, to determine upon a contingency that expired in the

time

time of a Life; a point which was never argued for Mr. *Howard* at the Bar, nor ſtirred by the Counſel.

Mr. *Serj. M.* I hope we for Mr. *Howard*, ſhall be heard to juſtify your Lordſhips Opinion.

Lord Chancellor, What hath been ſaid here at the Bench on both ſides, has been taken in Short-hand, and made publick, I know the Counſel on both ſides hath ſeen it, or will ſee and look into it well, and if they can give me any reaſonable ſatisfaction that I am in the wrong, I ſhall eaſily recede from it. But upon any thing yet offered, I am of the ſame mind I was. As to the Learned Judges that aſſiſted me at the hearing the Decree is mine, and the Oath that Decree is made upon is mine, theirs is but Learned Advice and Opinion. And therefore if they can ſatisfy my Conſcience, that they are in the right, and I not, well and good; if not, I muſt abide by that Decree I have made, according to my Conſcience. And I will repeat this to you, I go upon theſe Heads for my Opinion, and I would be glad any body would anſwer them. I ſay it is againſt natural Juſtice, to ſay that a Man who hath no Eſtate but what conſiſts in Terms, ſhall be diſabled from ſettling his Eſtate, ſo as to provide for the contingencies in his Family, that are in immediate proſpect. I ſay it is a common Caſe. A Man that is poſſeſſed for Years, aſſigns his Term in Truſt for himſelf, until ſuch a Marriage take effect, and after to himſelf for Life, to his Wife for Life, with remainder in Tail to his Children. Is that ſpringing Truſt upon the contingency of the Marriage good or not? If it be not good, then what will become of a great many Marriage ſettlements: If it be good, then why not in this Caſe as well as that. And I would fain know what difference there is between the Caſe as it is at the Bar, and if it had been limited thus, If my Lord *Arundel* had ſaid, that if *Thomas* Die without Iſſue, Living *Henry* then the Term for 200 Years in Tail ſhould ceaſe, and a new Term ſhould ariſe upon the ſame Truſt for *Charles*, that it ſeems had been well enough; is there any ſenſe in the World that can lead a reaſonable Man to conclude why there ſhould not be a new ſpringing Term upon the ſame Truſt. I cannot ſee any reaſon to run this Caſe down upon the ſingle authority of *Child* and *Baylie*'s Caſe, which was ſuch a reſolution, as never had its like before, nor ſince, but contradicted by ſeveral reſolutions as have been cited particularly, *Wood* and *Saunders* Caſe in this Court in my Lord *Bridgmans* time. Theſe are the grounds my preſent apprehenſions go upon, but I will hear Mr. *Keck*, if it may be in any reaſonable time, and give

give the reſpect to the Duke of *Norfolk*, that he ſhall not be ſurprized, tho' withall, I muſt do Mr. *Howard* the Juſtice that he be not eternally delaid.

Then the Day ſevennight was appointed, but upon the continuance of Mr. Kecks *illneſs, it was put peremptorily for Judgment on the firſt* Saturday *in the next Term.*

De Termino Trin. Anno Regis Car. II. 34 in Cancell.

Howard verſ. le Duc de Norfolk

Sabbati 17 *Junii.* Anno Dom. 1682.

Mr. *Serj. M.* MY Lord, we have nothing to do in that Cauſe, but to pray your Judgment.

Mr. *S. G.* My Lord we were in great hopes to have had other Aſſiſtances to day, but it ſeems we are diſappointed of them, That which I ſhall humbly offer is but ſhort. We are by your Lordſhips favour permitted now to offer ſomething if we can, to anſwer the objections which your Lordſhip made, and which were the ground of your Opinion. We did apprehend them to be theſe, that *Child* and *Baylie's* Caſe was not the ſame with this Caſe, and that the Caſe of *Wood* and *Saunders*, is the laſt reſolution of this Nature, and will rule this. We do my Lord, humbly with ſubmiſſion offer theſe Reaſons, why the firſt Caſe is the ſame with this, and the other difference from it. *Child* and *Baylie's* Caſe, my Lord, tho' it doth differ in ſome Circumſtances, yet it differs in no one that doth immediately concern the Limitation. For the Circumſtances wherein they Differ was the Length of the Term, being almoſt Expired, the Conveyances over to ſeveral Purchaſers, and at the end of the Term the reſolution taken. But tho' it differs in theſe Circumſtances, yet theſe have no influence upon the Limitation or the Conſtruction of Law upon the Limitation. Now the Limitation is the ſame there as it is here, for there it is to one for Life, and to his Son during the whole Term, and if he die without Iſſue during the Life of his Father and Mother, then the remainder over this remainder was adjudged void. This is the ſame Caſe with ours, for in the Caſe the firſt remainder actually veſted in *William* the Son for it was to him and his Aſſigns during the whole Term, and if he die without Iſſue

Living Father and Mother, then over. This remainder I ſay was adjudged void, he was actually ſeized of the whole Intereſt, which being veſted in him, could not be deveſted upon the contingent Limitations over, upon his death without Iſſue living Father and Mother. It is the ſame in our Caſe, the Duke of *Norfolk* has the Intereſt of this Eſtate by the Limitation in Tail actually veſted in him, and then it cannot be deveſted by the rule of *Child* and *Baylie's* Caſe upon the Contingency of *Thomas's* dying without Iſſue in the Life of *Henry*, which is during the Life of the now Duke of *Norfolk*. And in this reſpect the Caſe of *Wood* and *Saunders*, is not the ſame. It is a Limitation to the Father and Mother for Life, and for 60 years, if they ſo long live, then to *John* the Son, if Living at the time of the Death of Father and Mother, the whole Term. My Lord, this was not a veſting the Eſtate in *John* the Son, but a Contingent Limitation, that he ſhould take or not. If he were Living at the time of the Death of Father and Mother, then he ſhould take; If not, he ſhould not take. There was no Intereſt veſted in him till the Contingency hapned, and ſo the Limitations will be different. And that is the Ground that is drawn up in the Decretal Order of the Cauſe, becauſe this was a Contingent Limitation to *John*, and that never hapning, it is all one, as if it had never been limited, and amounts, putting the Contingent Limitation, which never hapned out of the Caſe, to no more than a Limitation to the Father and Mother for Life, the remainder over, which is well enough. This is that I have to offer, and I humbly ſubmit it to your Lordſhip.

Mr. *Serj. M.* And ſo we do, and pray your Judgment.

Mr. *R.* I ſee they are preſſing for your Lordſhips Judgment, and I know not whether it will become me to interpoſe with any thing.

Lord Chancellor, Say, ſay, for this is a Cauſe that deſerves patience.

Mr. *R.* No Man my Lord, can have any great encouragement to add any thing after all the Arguments that have been made in this Cauſe, or can hope to offer that which will be very material and new, but I deſire to have leave to ſay this in ſhort. My Lord, there be two Deeds by which this ſettlement is made, as a proviſion for the ſecond Son of this Family, and the younger Children, and therein it doth perhaps appear, that if the Bulk of the Eſtate, and the Honour ſhould come to the ſecond Son, then the ſettlement of this part that is made upon the ſecond Son, was intended to come to the now Plaintiff, and the younger Children. This is the Intention

tention of the two Deeds. By the firſt Deed the Eſtate of Freehold and Inheritance is limited in Tail. By the ſecond Deed the Truſt is declared of the Term for 200 Years that is limited to *Henry*, and ſo over. And therein it differs from the Caſe of *Wood* and *Saunders*; For the Truſt of the Term doth veſt in *Henry*, till the Contingency happen, but in *Wood* and *Saunders* Caſe, there it is limited to the Father and Mother for 60 Years, if they lived ſo long, then to *John* and his Heirs Males, in Caſe he ſurvive his Father and Mother, and the Truſt to be aſſigned to him accordingly, and if he die without Iſſue in the Life of the Father and Mother, then to *Edward* his Brother. No Man can ſay that ever any thing here did veſt in *John*; For it was but limited to him after his Father and Mother's life, in caſe he ſurvived them, but it never veſted in him, and ſo it differs from this Caſe. For here the Truſt of the Term did veſt in the Duke of *Norfolk* till the Contingency did happen. And as that is the difference between the two Caſes, and I do apprehend it is a difference with great reaſon from *Wood* and *Saunders* Caſe, ſo that which I infer from it is this, That where the Truſt of a Term is limited to a Man and his Iſſue, and his Heirs Males, and that veſted in him, if he die without Iſſue, or which is much a ſtronger Caſe, tho' the Contingency be reſtrained within the compaſs of a life, or of a certain time that is to wear out in a reaſonable diſtance, yet coming after a Limitation in Tail cannot carry the remainder over. For if you once admit it during one life, you muſt admit it during twenty lives, for the reaſon is the ſame as to twenty, as it is to one, if they be all in Being, and perhaps the reaſon will be the ſame as to twenty lives all in Being, and for the life of one perſon more. Then if the Truſt of a Term where it is once veſted in Tail, can never be well limited over, tho' reſtrained within the Contingent diſtance of a reaſonable time. This Limitation to the Plaintiff can never be good. My Lord, I crave leave to offer your Lordſhip one Caſe or two; ſuppoſe that a Term for Years, or the Limitation of the Truſt of a Term for Years (for I think there is the ſame conſtruction made of both) be limited to *J. S.* and the Iſſue of his Body, and if *J. S.* die without Iſſue within 100 Years (for the purpoſe) or within twenty Years, then to go over to *J. N.* that cannot be apprehended to be good, but void; for there is no difference between 1000 or 100 or 20 Years, yet 20 Years is but a reaſonable time, and not more in proſpect than one or ten lives. If a Man limit the Truſt of a Term, or a Term it ſelf to *J. S.* and

and the Iſſue of his Body, and if he die without Iſſue before 21. then to go over to *J. N.* This a reaſonable diſtance of time, and yet I believe this will not be allowed to be good and well limited over. And the reaſon is, where once a Term is limited to a Man and his Iſſue, this in a reaſonable conſtruction of Law carries the whole Term (for it was a good while before they gained the point of remainders after lives) and (if after it be ſaid,) if he die without Iſſue within a 100 Years, or before 21. that reſtriction will not help it as we think. Then where is the reaſon or ſenſe that it ſhould be otherwiſe, if he die without Iſſue in the life of another perſon? Truly my Lord, it is very hard to find out a true difference between the Caſes where the Reſtriction is, for the life of a certain perſon, and where it is upon a certain number of Years. My Lord, I would put this Caſe upon *Wood* and *Saunders* Caſe, which is the authority that is ſo much preſſed upon us. Suppoſe that Caſe had been thus; to the Father for 60 Years, if he ſo long live; to the Mother for 60 Years, if ſhe ſo long live, and then inſtead of that Limitation to *John*, in Caſe he ſurvived his Father and Mother; ſuppoſe it had been to the firſt Son of the Father and Mother, and the Heirs of his Body, and if ſuch firſt Son die without Iſſue in the life-time of his Father and Mother, then it ſhould go over to another perſon. Had it then been good? ſurely no. What is the difference? Why this, it being to *John*, in caſe he ſurvived his Father and Mother, nothing veſted. But if it had been to the firſt Son, and the Heirs of his Body, and they have a Son, there it differs; for it is actually veſted in him. And there the Limitation over to a ſtranger would not be good, even admitting the Caſe of *Wood* and *Saunders* to be uncontroulable. Another Objection your Lordſhip made, was about the neceſſary Limitations of the Truſts of Terms by Termers upon Marriage Settlements to a Mans ſelf, till the Marriage take effect, and then to ſuch and ſuch uſes; and the Objection is, why ſhould it not be as good a Limitation of the Truſt of a Term, or of a Term it ſelf, as well as of an Inheritance. That will not reach our Caſe, therefore I need not ſay any thing to it, whether it would be ſo or no. But ſuppoſe this Caſe, there be two Brothers, the Eldeſt hath no Children, the younger Brother hath a Son, and is a going to Marry the Son, but hath but a ſmall Eſtate to give him. The Elder Brother he has a Term for Years, and has a mind to provide for the Son of his Younger Brother, and his intended Wife, and he limits the Truſt of his Term thus to the uſe of himſelf, and his Exe-

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cutors till the Marriage be had, but if he die, or provided he die, before the Marriage had without Iſſue living, his Younger, Brother, the Father of him that is to be Married, then to the uſe of that Son, and ſo on. We do make a great doubt, whether the Limitation of the Truſt of the Term there, would be good or not, upon the difference of *Child* and *Baylies* Caſe, that has been ſo often mentioned in this Cauſe, and was ſo ſolemnly reſolved. The reſolution of which Caſe, and that alſo of *Wood* and *Saunders*, we ſubmit to your Lordſhips conſideration. As for the intention of the Parties in this ſettlement, we cannot but ſay, it was intended as a proviſion, that when the Bulk of the Eſtate, and the Honour came to the Duke, his Younger Brothers ſhould have an increaſe of their Portions. But it is as plain the intent does fail as to all the other Younger Children, becauſe the conſtruction of Law will not ſupport it. So that the intent without the Rule of Law to maintain it, will ſignify nothing.

Mr. *H.* If your Lordſhip will pleaſe to give me leave, I think, I may offer ſomething that has not yet been obſerved; We do not trouble your Lordſhip, or our ſelves out of a preſumption, that we ſhall ſo far prevail, as to alter the Opinion your Lordſhip has delivered; but truly my deſign is to offer ſome reaſons, why I hope your Lordſhip will be pleas'd to take ſome further conſideration of the matter. Not, but that I know your Lordſhip did very ſeriouſly deliberate upon it, before you delivered your Opinion, and you have been pleaſed to tell us the reaſons you went upon, and they were two. Firſt, upon the Caſe of *Wood* and *Saunders* in this Court: And Secondly, upon the natural Reaſon and Juſtice, that a Man that has no other Eſtate, but Terms for Years, ſhould have a power to ſettle thoſe Terms, ſo as to provide for the Contingencies of his Family. That a ſettlement of a Term upon Truſtees to himſelf, till the Marriage take effect, and then over, ſhall be good; this might be reſembled to *Pell* and *Browns* Caſe, and ſo come within the ſame reaſon. Now my Lord, with ſubmiſſion, we have this to offer. This Truſt of this Term in our Caſe, was firſt to attend the Inheritance, and that was an Eſtate Tail limited, but then there is a Contingency added to this Truſt, to this Truſt of the Term, that if *Thomas* die without Iſſue, living *Henry*, then to *Charles*, and as it hath been ſaid already, it is very plain this Entail of the Term did actually veſt. Then the ſingle firſt Queſtion is, whether upon the Contingency hapning, the death of Duke *Thomas* without Iſſue, it ſhall deveſt, and a ſpringing Truſt

ariſe to the now Plaintiff Mr. *Charles Howard*. It is ſaid there was a juſt care taken for him that was a Younger Son, ſo there was, but a like care was taken for the other five, *Bernard*, &c. as well as for him. Now then the Caſe lies upon this doubt, with ſubmiſſion to your Lordſhip, whether this can enure by way of a ſpringing Truſt by a new Creation. We think that cannot be; for here being once an Eſtate Tail limited in a Term that was to attend an Eſtate Tail of the Inheritance, the Remainder over muſt be void in the very Creation. My Lord, I have obſerved, ever ſince I have had the honor to practiſe at this Bar, and very many particular inſtances might be given, that when the Judges have been upon the Caſes called to adviſe, here they would not go beyond, nor think fit that the Court would not go beyond, nor think fit that this Court ſhould, beyond the Reſolution in *Mannings* Caſe. And they have often ſaid, if that Caſe were now to be adjudged, it would receive another kind of Reſolution. The Judges gave that Reſolution by way of Executory deviſe, and now I think, ſince that, there have been more Suits in this Court of this Nature ſince the King's Reſtauration, than were in forty Years before. For cunning People will be always finding out Perpetuities, and are fond of Limitations tending to Perpetuities, not only in Inheritance, but in Terms for Years. After *Mannings* Caſe, the Conveyancers did contrive theſe Truſts of Terms for Years to go beyond that Caſe. For they ſeemed to argue thus, That being good by way of Executory deviſe, then we will declare a Truſt, and that the Law has nothing to do with, it is a Creature of Equity, and Governably by Equity. And I have ſeen a Conveyance of this Nature made by my Lord of *Leiceſter* to *Marryot* and *Weſtern*, drawn 1658. Where there was the Truſt of a Term limited over after an Eſtate Tail, but that was never inſiſted upon to be good, all the Caſes being otherwiſe. If then it be not good by way of Executory deviſe, it cannot be good by way of Limitation of the Truſt of a Term. Now in this Caſe, certainly it would not be a good Remainder by way of Executory deviſe. For when a Term is deviſed to end in Tail, no Man will ſay a Remainder of the Term can be limited over. As for the Caſe of *Wood* and *Saunders*, That, My Lord, I conceive had been good by way of Executory deviſe. A Man that hath a Term, deviſeth it to his Wife for life, and if *John* his Son be living at the death of his Wife, then to him in Tail, but if he die without Iſſue living, Wife, then to *Edward*, that might be good. For it is a condition precedent as to *John*, and there he muſt ſurvive his Father and Mother, or he takes

nothing

nothing, but he dying before them, never veſted in him at all, and ſo might well veſt in *Edward*. But in our Caſe it is void in the Creation, becauſe in the Caſe here before your Lordſhip it did veſt, and was to attend the Inheritance, when the Contingency happens: Can it then enure to the Plaintiff by way of ſpringing Truſt? ſurely no. In *Wood* and *Saunders* Caſe it never veſted, in our Caſe it did veſt. But I muſt, My Lord, crave leave to ſay one word to another point in the Caſe, and that is the Recovery. When Contingent Remainders in Law, in Caſes of Settlements, may be by any act in Law barred, this Court I conceive, will not ſet them up agen. Now in this Caſe before the Contingency hapned, when the Eſtate Tail of the Inheritance was in my Lord Duke of *Norfolk*, and the Leaſe for 200 Years attendant upon that Eſtate Tail, then doth my Lord Duke ſuffer a common Recovery, which we apprehend hath ſo barred and deſtroyed this Term, that this Court will never interpoſe to ſet it up again. My Lord, that which on the Dukes behalf we now deſire is, that your Lordſhip will be pleaſed to take ſome further time to conſider of it, and deliver your Judgment the next Term.

Mr. *Serj. M.* My Lord, I did not expect I muſt confeſs, an Argument at this rate, and at this time; but your Lordſhip in great tenderneſs and favour, hath given them leave to do it: but after all, under favour, what they ſay is a great miſtake of the Caſe. If they had obſerved what was ſaid, and truly applied it, they would have anſwered themſelves. What interpretation in ſuch a Caſe ſhall be made, or not be made, is meerly matter of Equity, which upon the circumſtances of every Caſe is governable by the Circumſtances. I would not go after their Example to argue, to ſupport, as they have done to overturn the Opinion of the Court that has been delivered. But I would offer this to your Lordſhip, there is a great miſtake in calling this a Remainder, it is no ſuch thing as a Remainder: It is indeed a ſpringing Truſt upon a Contingency; But pray, my Lord, conſider, how it ſtands here in Equity before your Lordſhip. Here is a noble and great Family, the Heir of it under the Viſitation of the Hand of God, which no one could remove but God alone, here are a great and numerous Iſſue to provide for, that proviſion which is made according to the Rules of Nature and Juſtice, and it being neceſſary to be done, no Man could contrive it better than this ſettlement. My Lord, they frighten us with the word Perpetuity. It is true, a Perpetuity cannot be maintained, that is, an Inheritance not to be aliened or barred, or that can never end. But

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here is but the name of a Perpetuity, and certainly, that muſt be a ſtrange and monſtrous Perpetuity, that muſt determine within the ſhort ſpace of a Life. A Perpetuity is an Eſtate that can never be barred. And *Littleton* hath a Rule, that there is no Eſtate but can be barred, if all the Perſons concerned in it joyn. But it is under favour a contradiction, and a great one to call this a Perpetuity; a monſtrous one, I ſay it is, where any Man can ſee the end of it, and whereas to the circumſtances of the Caſe, the Family could not otherwiſe be well provided for. And whereas Perpetuities are abhorred, it is upon the inconvenience, which hinders other proviſions in caſe of neceſſity, and it were indeed an inconvenience, that every Family ſhould have the misfortunes that were in this, and not be able to provide ſome ſort of remedy for them. Some caſes my Lord, have been put by the other ſide now, which under favour are nothing to the purpoſe, and would need no other anſwer than they give themſelves. But truly I think it is not fit for the advantage of the publick, that after a Caſe has been ſo ſolemnly argued, the Counſel ſhould diſpute the Opinion of the Court.

My Lord, I would deſire to ſay a word in anſwer to ſome things that have been urged. As to the Caſe that Mr. *H--ch--s* put, I think it had been good by way of Executory deviſe. To one and his Heirs Males, till ſuch an one returns from *Rome*, or the like, had been good, eſpecially where the determination Depends but upon the expiring of a ſhort Life. But all this is but *Petitio principii*, the ſame thing over and over. As for *Child* and *Baylies* Caſe, there are ſeveral things, that differ it from ours. There it hath a ſemblance of our Caſe, of one dying without Iſſue, but it is there upon a Life, and not within a Life as ours doth. And in our Caſe, my Lord, this Limitation to *Henry*, is a Limitation of a Term attendant upon an Inheritance, and then it is plainly as if the Limitation of a Freehold Eſtate were to one and the Heirs of his Body, and if ſuch an accident happens, the Eſtate to ceaſe, and be to another for a 100 Years. And it is in *Henry* attendant upon the Inheritance; it ſhould not if *Henry* had died, gone to his Exeecutor but to his Heir. Then as to *Charles*, here is a condition that determines the whole Truſt as to *Henry*, and there it begins to be firſt a Limitation of a Term in groſs. He that creates a Term attendant upon an Inheritance, may ſever it if he will, and if he may ſever it, may he not limit it upon a Contingency, that upon ſuch a Contingency it ſhall be ſevered. All conditions are either precedent, or ſubſe-

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quent. Precedent to create a ſpringing Truſt, and Subſequent to deſtroy the former Eſtate. In *Wood* and *Saunders* Caſe, *John* did not take, but upon the precedent Condition, but *Edward* took it upon the ſubſequent Condition. In our Caſe this condition is both; as to the deſtroying of the Truſt to *Henry* it is a ſubſequent Condition, but as to the creating a new Truſt to *Charles* it is a precedent Condition. My Lord, I muſt not undertake to argue this Caſe, but only to ſay a little to what was ſaid on the other ſide; we hope it being upon ſo ſhort a Contingency which has now hapned, the Limitation of this Term to the Plaintiff is good, and we pray your Judgment for him.

THE Lord Chancellor's SECOND ARGUMENT.

Lord Chancellor, I Am not ſorry for the Liberty that was taken at the Bar to argue this over again, becauſe I deſired it ſhould be ſo; for in truth I am not in love with my own Opinion, and I have not taken all this time to conſider of it, but with very great willingneſs to change it, if it were poſſible. I have as fair and as juſtifiable an opportunity to follow my own Inclinations (if it be lawful for a Judge to ſay he has any) as I could deſire; for I cannot concur with the three Chief Judges, and make a Decree that would be unexceptionable: But it is my Decree, I muſt be ſaved by my own Faith, and muſt not Decree againſt my own Conſcience and Reaſon.

It will be good for the ſatisfaction of the publick in this Caſe, to take notice how far the Court is agreed in this Caſe, and then ſee where they differ, and upon what grounds they differ; and whether any thing that hath been ſaid be a ground for the changing this Opinion. The Court agreed thus far:

That in this Caſe it is all one, the Limitation of the Truſt of a Term, or the Limitation of the Eſtate of a Term, all depends upon one and the ſame Reaſon. The Court is likewiſe agreed (which I ſhould have ſaid firſt, to diſpatch it out of the Caſe, that it may not trouble the Caſe at all) that the Surrender of *Marryot* to the Duke of *Norfolk*, and the common Recovery ſuffered by the Duke, are of no uſe at all in this Caſe: For if this Limitation to *Charles* be good, then is that Surrender and the Recovery a breach of Truſt, and ought to be ſet aſide in Equity, ſo all the Judges that aſſiſted at the hearing of this Cauſe agreed; If the Limitation be not good, then there was no need at all of a Surrender to bar it, nor of the common Recovery to extinguiſh it.

But then we come to conſider the Limitation, and there it agreed all along in point of Law, That the meaſures of the Limitations of the Truſt of a Term, and the meaſures of the Limitations of the Eſtate of a Term, are all one, and uniform here, and in other Caſes, and there is no difference at Chancery or at Common Law, between the Rules of the one and the Rules of the other; what is good in one Caſe, is good in the other. And therefore in this Caſe the Court is agreed too, that the Limitations made in this Settlement to *Edward*, &c. are all void, for they tend directly and plainly to Perpetuities, for they are Limitations of Remainders of a Term in groſs after an Eſtate Tail in that Term, which commenceth to be a Term in groſs, when the Contingency for *Charles* happens.

Thus far there is no difference of Opinion: but whether the Limitation to *Charles*, if *Thomas* die without Iſſue, living *Henry*, whereby the Honour of the Earldom of *Arundel* deſcends upon *Henry*; I ſay, whether that be void too, is the great Queſtion of this Caſe wherein we differ in our Opinions.

It is ſaid that is void too; and yet (ſever it from the Authority of *Child* and *Baylie*'s Caſe, which I will ſpeak to by and by) I would be glad to ſee ſome tolerable Reaſon given why it ſhould be ſo; for I agree it is a Queſtion in Law here upon a Truſt, as it would be elſewhere upon an Eſtate; and ſo the Queſtions here, are both Queſtions of Law and Equity. It was well ſaid, and well allowed by all the Judges, when they did allow the Remainders

mainders of Terms after Eſtates Tail in thoſe Terms to be void. I ſhall not deviſe a Term to a Man in Tail with Remainders over; the Judges have admirably well reſolved in it, and the Law is ſetled (and *Matthew Mannings* Caſe did not ſtretch ſo far) becauſe this would tend to a Perpetuity.

Now on the other ſide, I would fain know, when there is a Caſe before the Court, where the Limitation doth not tend to a Perpetuity, nor introduceth any viſible Inconvenience, what ſhould hinder that from being good: For tho' if there be a tendency to a Perpetuity, or a viſible Inconvenience, that ſhall be void for that reaſon; yet the bare Limitation of the Remainder after an Eſtate Tail, which doth not tend to a Perpetuity, that is not void. Why? becauſe it is not? I dare not ſay ſo; ſee then the Reaſons why it is ſo. The Reaſons that I lie under the load of, and cannot ſhake off, are theſe.

The Law doth in many Caſes allow of a future Contingent Eſtate to be limited, where it will not allow a preſent Remainder to be limited; and that Rule, well underſtood, goeth through the whole Caſe. How do you make that out? Thus: If a Man have an Eſtate limited to him, his Heirs and Aſſigns for ever, (which is a Fee-ſimple) but if he die without Iſſue living *J.S.* or in ſuch a ſhort time then to *J.D.* tho' it be impoſſible to limit a Remainder of a Fee upon a Fee, yet it is not impoſſible to limit a Contingent Fee upon a Fee. And they that ſpeak againſt this Rule, do endeavour as much as they can to ſet aſide the Reſolution of *Pells* and *Browns* Caſe, which (under favour) was not the firſt Caſe that was ſo Reſolved; for as I ſaid before, when I firſt delivered my Opinion, it was reſolved to be a good Limitation, 19 *Eliz.* in the Caſe of *Hinde* and *Lyon*, 3 *Leonard* 64. which by the way is the beſt Book of Reports of the later ones that hath come out without Authority. If that be ſo, then where a preſent Remainder will not be allowed, a Contingent one will. If a Leaſe for years come to be limited in Tail, the Law allows not a preſent Remainder to be limited thereupon, yet it will allow a future Eſtate ariſing upon a Contingency only, and that to wear out in a ſhort time.

But what time? and where are the bounds of that Contingency? You may limit, it ſeems, upon a Contingency to happen in a life: what if it be limited, if ſuch a one die without Iſſue within 21 Years, or 100 Years, or while *Weſtminſter-hall* ſtands? Where will you ſtop if you do not ſtop here? I will tell you where I will ſtop: I will ſtop where-ever any viſible Inconveniece doth appear; for the juſt bounds of a Fee-ſimple upon a

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Fee-ſimple are not yet determined, but the firſt Inconvenience that ariſeth upon it will regulate that.

Firſt of all then, I would fain have any one anſwer me, where there is no Inconvenience in this Settlement, no Tendency to a Perpetuity in this Limitation, and no Rule of Law broken by the Conveyance? what ſhould make this void? And no Man can ſay that it doth break any Rule of Law, unleſs there be a Tendency to a Perpetuity, or a palpable Inconvenience. Oh, yes, Terms are meer Chattels, and are not in conſideration of Law ſo great as Freeholds, or Inheritances. Theſe are words, and but words, there is not any real difference at all, but the Reaſon of Mankind will laugh at it: ſhall not a Man have as much power over his Leaſe, as he has over his Inheritance? If he have not, he ſhall be diſabled to provide for the Contingencies of his own Family that are within his view & proſpect, becauſe it is but a Leaſe for years, and not an Inheritance or a Freehold. There is that abſurdity in it which is to me inſuperable, nor is the Caſe that was put, anſwered in any degree. A Man that hath no Eſtate but what conſiſts in a Leaſe for years, being to Marry his Son, ſetled this Leaſe thus: In Truſt for himſelf in Tail, till the Marriage take effect; and if the Marriage take effect while he lives, then in Truſt for the Married couple; is this future Limitation to the married couple good or bad? If any Man ſay it is void, he overthrows I know not how many Marriage-ſettlements: If he ſay it be good, why is it not a future Eſtate in this Caſe as good as in that, when there is no tendency to a Perpetuity, no viſible Inconvenience?

All Men are agreed, (and my Lord Chief Juſtice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I deſire no better argument in the World to maintain my Opinion, than that; For, ſays my Lord Chief Juſtice, ſuppoſe it had not been ſaid thus, if *Thomas* die without Iſſue, living *Henry*, then over to *Charles*; but thus, if it happens that *Thomas* die without Iſſue in the life of *Henry*, &c. then this Term ſhall ceaſe, and there ſhall a new Term ariſe and be created to veſt in *Charles* in Tail, and that had been wonderful well, and my Lord of *Arundel*'s intention might have taken effect for the younger Son. This is ſuch a ſubtilty as would poſe the Reaſon of all Mankind: For I would have any Man living open my underſtanding ſo far, as to give me a tolerable Reaſon why there may not be as well a new ſpringing Truſt upon the ſame Term to go to *Charles*, upon that Contingency, as a new ſpringing Leaſe upon the ſame Truſt: For the latter doth much

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more tend to a Perpetuity than the former doth, I am bold to ſay it.

But I expect to hear it ſaid from the Bar, and it has been ſaid often, the Caſe of *Child* and *Balie* is a great Authority, ſo it is. But this I have to ſay to it, firſt, the point reſolved in *Child* and *Balie's* Caſe was never ſo reſolved before, nor ever was there ſuch a Reſolution ſince. *Pells* and *Browns* Caſe was otherwiſe reſolved, and has often been adjudged ſo ſince. In the next place, I will not take much pains to diſtinguiſh *Child* and *Balie's* Caſe from this, tho' the word (Aſſigns) and the grant of the Remainder by the Mother, who was Executrix, are things that *Rolls* lay hold on as Reaſons for the Judgment. But I know not why I may not with Reverence to the Authority of that Caſe, and the Learning of thoſe that Adjudged it, take the ſame liberty as the Judges in *Weſtminſter-hall* ſometimes do, to deny a Caſe that ſtands ſingle and alone of it ſelf. And I am of Opinion the Reſolution in that Caſe is not Law, tho' there it came to be reſolved upon very ſtrange circumſtances to ſupport ſuch a Reſolution; for the Remainder of a Term of ſeventy ſix years is called in queſtion when but fifteen years of it remained, and after the poſſeſſion had ſhifted hands ſeveral times, and therefore I do not wonder that the Conſideration of Equity ſwayed that Caſe.

But I put it upon this point, pray conſider, there is nothing in *Child* and *Balie's* Caſe that doth tend to a Perpetuity, nor any thing in the Settlement of the Eſtate there, that could be called an Inconvenience, nor any Rule of Law broken by the Conveyance; but it is abſolutely a Reſolution *quia volumus*. For it diſagrees with all the other Caſes before and ſince, all which have been otherwiſe reſolved; but it is a Reſolution, I ſay, meerly becauſe it is a Reſolution. And it is expreſly contrary to *Wood* and *Saunder's* Caſe, which no Art or Reaſon can diſtinguiſh from our Caſe or That. For here was that Caſe which was clipt and minced at the Bar, but never anſwered. *Wood* and *Saunder's* Caſe is this. To the Husband for ſixty years, if he lived ſo long; to the Wife for ſixty years, if ſhe lived ſo long; then if *John* be living at the time of the death of the Father and Mother, then to *John*; but if he die without Iſſue, living Father or Mother, then to *Edward*. Suppoſe theſe words (living Father or Mother) had been out of the Caſe, and it had been to *John*, and if he die without Iſſue, to *Edward*, will any Man doubt, but then the Remainder over had

been void, becauſe it is a limitation after an Expreſs Entail? How came it then to be adjudged good! becauſe it was a Remainder upon a Contingency, that was to happen during two lives, which was but a ſhort Contingency, and the Law might very well expect the hapning of it? Now that is This Caſe, nay ours is much ſtronger; for here it is only during one life, there were two.

Roll. abr. tit. Deviſe 612.

The Caſe of *Cotton* and *Heath* in *Rolls* comes up to this: A Term is deviſed to *A.* for eighteen years; the Remainder to *B.* for life, the Remainder of the firſt Iſſue Male of *B.* which is a Contingent Eſtate after a Contingency, and yet adjudged good, becauſe the happening of the Contingency was to be expected in ſo ſhort a time. Now that Caſe was adjudged by my Lord Keeper *Coventry*, Mr. Juſtice *Jones*, Mr. Juſtice *Crooke*, and Mr. Juſtice *Berkley*, as *Wood* and *Saunder's* Caſe was by my Lord Keeper *Bridgman*, Mr. Juſtice *Twiſden*, and Mr. Juſtice *Reinsford*; ſo that however I may ſeem to be ſingle in my Opinion, having the misfortune to differ from the three Learned Judges who aſſiſted me, yet I take my ſelf to be ſupported by ſeven Opinions in theſe two Caſes I have cited.

If then this be ſo, that here is a Conveyance made which breaks no Rules of Law, introduceth no viſible Inconvenience, ſavours not of a Perpetuity, tends to no ill Example, why this ſhould be void only, becauſe it is a Leaſe for years, there is no ſence in that.

Now if *Charles Howards* Eſtate be good in Law, it is ten times better in Equity. For it is worth the conſidering, that this Limitation upon this Contingency happening, (as it hath, God be thanked) was the conſiderate Deſire of the Family, the Circumſtances whereof required Conſideration, and this Settlement was the reſult of it, made with the beſt Advice they could procure, and is as prudent a proviſion as could be made. For the Son now to tell his Father that the proviſion that he had made for his younger Brother is void, is hard in any Caſe at Law; but it is much harder in Chancery, for there no Conveyance is ever to be ſet aſide, where it can be ſupported by a reaſonable Conſtruction, and here muſt be an unreaſonable one to overthrow it.

I take it then to be good both in Law and Equity; and if I could alter my Opinion, I would not be ashamed to retract it, for I am as other Men are, and have my partialities as other Men have. When all this is done, I am at the Bar desired to consider further of this Case: I would do so, if I could justifie it; but Expedition is as much the right of the Subject, as Justice is, and I am bound by *Magna Charta*, *Nulli negari, nulli differre Justitiam*. I have taken as much pains and time as I could be informed; I cannot help it if wiser Men than I be of another Opinion, but every Man must be saved by his own Faith, and I must discharge my own Conscience.

I have made several Decrees since I have had the Honour to sit in this place, which have been reversed in another place, and yet I was not ashamed to make them, nor sorry when they were reversed by others. And I assure you, I shall not be sorry if this Decree which I do make in this Case, be reversed too; yet I am obliged to pronounce it, by my Oath and by my Conscience. For I cannot adjourn a Case for difficulty out of an English Court of Equity into the Parliament; there never was an Ajournment *Propter Difficultatem*, but out of a Court of Law where the proceedings are in Latin. The proceedings here upon Record are in English, aud can no way now come into Parliament, but by way of appeal, to redress the Error in the Decree. I know I am very likely to err, for I pretend not to be Infallible; but that is a thing I cannot help. Upon the whole matter, I am under a Constraint, and under an Obligation which I cannot resist. A Man behaves himself very ill in such a place as this, that he needs to make Apologies for what he does, I will not do it. I must Decree for the Plaintiff in this Case, and my Decree is this:

That the Plaintiff shall enjoy this Barony for the residue of the Term of two hundred years, the Defendant shall make him a Conveyance accordingly, because he extinguished the Trust in the other, and the Term contrary to both Law and Reason, by the Merger and Surrender and common Recovery. And that the Defendants do account with the Plaintiff for the profits of the premisses by them or any

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of them received ſince the Death of the ſaid Duke *Thomas*, and which they or any of them might have received without wilful default; and that it be referred to Sir *Lacon William Child*, Knight, one of the Maſters of this Court, to take the ſaid Accompt, and to make unto the Defendants all juſt allowances; and what the ſaid Maſter ſhall certifie due, the ſaid Defendants are to pay unto the Plaintiffs, according to the Maſters Report herein to be made. And that the Defendants ſhall forthwith deliver the poſſeſſion of the Premiſſes to the Plaintiff, and that the Plaintiff ſhall hold and enjoy the ſaid Barony of *Greyſtock*, with the Lands and Tenements thereto belonging, for the reſidue of the ſaid Term of two hundred years, againſt the Defendants, and all claiming by, from, or under them. And it is further Ordered and Decreed, that the ſaid Defendants do Seal and Execute ſuch a Conveyance of the ſaid Term to the Plaintiff as the Maſter ſhall approve of, in Caſe the parties cannot agree the ſame; but the Defendants are not to pay any Coſts of the Suit.

Die Veneris, 19 Junii, 1685.

AFter hearing Council two ſeveral days upon the Petition and Appeal of *Charles Howard*, Eſq; ſhewing, that his Father intended a Proviſion for his younger Children, by Deed, made by advice of eminent Council, and did ſettle the Barony of *Greyſtocke*, and other Lands, of the value of 500 *l. per annum*, in Truſtees, in order thereunto; and that after a long Suit in Chancery, wherein the Petitioner was Plaintiff, againſt his Grace the late Duke of *Norfolk*, the Marqueſs of *Dorcheſter*, *Henry* Lord *Mowbray*, and *Richard Marriott*, Eſq; Defendants, the Cauſe coming to be heard before the Lord Chancellor *Nottingham*, on the 17*th* of *June*, in the Four and Thirtieth Year of His late Majeſties Reign, of Glorious Memory; who after ſeveral Days hearing, did declare his Opinion to be, That the Petitioner had a good Title to the Barony of *Greyſtocke*, and other the Lands in queſtion; and Decreed the Defendants to account to him for the Profits thereof by them received after the Death of *Thomas*, late Duke of *Norfolk*; which Decree was ſigned and enrolled, and the Petitioner actually veſted in the Poſſeſſion of the ſaid Mannors and Premiſſes; and further ſheweth, That the Defendants, the late Duke of *Norfolk*, the Lord *Mowbray*, now Duke of *Norfolk*, and *Richard Marriott*, exhibited a Bill of Review into the High Court of *Chancery*, for reverſing the ſaid Decree; to which the Petitioner put in a Plea, and Demurer; which being argued on the 15*th* of *May*, in the Five and Thirtieth Year of the Reign of our late King, *Charles* the Second, before the Right Honourable the Lord Keeper of the Great Seal of *England*, who after hearing Council on both ſides, over-ruled the ſaid Plea and Demurrer, and reverſt the Decree aforeſaid; and ordered a Writ, or Writs of Reſtitution, to be directed to the Sheriffs of *Cumberland* and *Weſtmerland*, to put the Plaintiffs in the Bill of Review, in Poſſeſſion; which accordingly was done, as in the Petition, amongſt other things, is ſuggeſted; and prayed a Reverſal of the laſt Decree; as alſo upon the Anſwer of the Right Noble *Henry* Duke of *Norfolk*, Earl Marſhal of *England*, and *Richard Marriot*, Eſq; put in thereunto. And after due Conſideration had of what was offered at the Bar by Council on either part thereupon, It is ordered and adjudged by the Lords Spiritual and Temporal, in Parliament aſſembled, That the ſaid Decree made in the High Court of *Chancery*, on the 15*th* of *May*, in the Five and Thirti-

eth Year of the Reign of the late King *Charles* the Second, of Glorious Memory, in behalf of the late Duke of *Norfolk*, and the now Duke of *Norfolk*, and *Richard Marriott*, Esq; be and is hereby reversed; and that the Decree made in the said Court of *Chancery*, on the 17*th* of *June*, in the Four and Thirtieth Year of His late Majesties Reign, in behalf of *Charles Howard*, Esq; the now Petitioner, Be, and Is hereby *affirmed*.

JOHN BROWNE, Cler. Parl.

FINIS.